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# CHANCERY CHAMBERS

## REPORTS.

BY

ALEXANDER GRANT, BARRISTER,  
REPORTER TO THE COURT.

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VOLUME I.

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TORONTO :  
HENRY ROWSELL,  
KING STREET.

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1868.

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HENRY ROWSELL, LAW PRINTER, KING STREET, TORONTO.

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# CHANCERY CHAMBERS REPORTS.

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## CRYNE v. DOYLE.

Where an order to take the bill *pro confesso* had been obtained six years ago, and no proceedings had been taken since to bring the cause on to a hearing, leave was given to the plaintiff to set down the cause, giving to the defendant notice forthwith of the proceedings.

This was an application upon petition by *Hallinan* for the plaintiff, setting forth that in January, 1852, an order *pro confesso* had been obtained, but no proceedings had been since taken in the cause, arising from differences between the plaintiff and his solicitor, and praying for leave to set the cause down for hearing.

ESTEN, V. C.—Granted the order, and directed the plaintiff forthwith to give notice of the proceedings.

---

## SLATER v. FISKEN.

### *Vesting order.*

A party purchasing under a decree of the court has a right to call for evidence shewing that persons whose interests were intended to be disposed of were alive at the time of such sale, before accepting title by means of a vesting order.

And *quære*, whether, under any circumstances, the court would compel a purchaser to accept title by a vesting order instead of a conveyance.

In this suit a sale had been made of lands, the title to which was vested in a married woman and infants, and the defendants who had the conduct of the sale having been unable to ascertain the residence of the parties whose estate had been sold.

A motion was now made on their behalf for an order vesting the property sold in the purchaser under the provisions of the act 20 Vic., ch. 56, sec. 8.

*Hodgins*, contra, opposed the application, as it had not been shewn that at the time of the sale the persons whose interests had been sold were living.

ESTEN, V. C., refused the application, as the purchaser had a clear right to require proof that the persons whose estates were sold were in existence at the time of the sale, and expressed a doubt if, under any circumstances, the court would force a purchaser to accept title under a vesting order instead of by a conveyance, the purchaser's right being to insist upon covenants from the grantors.

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### LIPSEY v. CRUISE.

*Absconding defendant.*

An application was made to advertise a defendant as absconding, and in the affidavit it was sworn that the defendant had absconded to Michigan, where his wife had lately gone to join her husband, but did not state that any endeavour had been made to ascertain his residence.

ESTEN, V. C., before granting the application, required an affidavit to be produced shewing that the defendant could not be found in Michigan, where it was supposed he had gone to reside, for the purpose of being served with the bill out of the jurisdiction.

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### CAMPBELL v. TAYLOR.

The order permitting the service of the bill upon the agent of a corporation aggregate does not authorize service upon agents of corporations within Upper Canada.

The office copy bill in this case had been served on John McDonald, agent of the Bank of Upper Canada at Goderich, and *Fitzgerald* for plaintiff now applied under the order of 19th March, 1857, for an order *pro confesso* against the bank for want of answer, the time limited for answering having expired.

SPRAGGE, V. C.—Refused the application, the order under which the service had been effected applying only to foreign corporations who have agencies within Upper Canada.

## HURD v. ROBERTSON.

*Contempt, objection of, to party moving.*

It would seem that a plaintiff prosecuting his decree is entitled to do so, notwithstanding he may have been placed in contempt for disobedience to an order of the court for payment of money: In such a case the defendant must obtain an order staying proceedings until the contempt is purged.

This was a suit brought to enforce a contract of purchase of lands agreed to be sold by the defendant to the plaintiff. It appeared that the bill was filed on the 28th of February, 1856: that an application for reference as to title and payment of money into court was made on behalf of the defendant on the 31st of March, 1856, and reference as to title then ordered, and that an order for payment of money into court was made on the 12th of May, 1856: that the 2nd of May, 1856, was appointed for the defendant to bring in an abstract of title, which was brought in and filed on 30th May, 1856, and objections filed by plaintiff same day: that investigation of title was commenced before the Hon. V. C. *Esten* on the 29th, and continued on the 30th of May, 1856, when it stood over: that the investigation was renewed by plaintiff on the 6th of December, 1856, and resisted by defendant on the ground of pendency of the appeal, which objection was overruled, and investigation ordered to stand over for two months: on the 16th of June, 1857, defendant moved to set aside bond in appeal or for such other proceeding as would compel plaintiff to proceed with the appeal, which application was not granted, but plaintiff undertaking to hear the appeal at the sitting after Michaelmas Term then next, and defendant undertaking to use due diligence in bringing in evidence of title, an order was drawn up accordingly. On the 27th of June, 1857, the investigation as to title was renewed by plaintiff, before Hon. V. C. *Esten*, and was now again proceeded with by the plaintiff, when *Roaf*, for the defendant, objected to the inquiry proceeding, on the ground that plaintiff was in contempt for non-payment into court of £1,500, part of the purchase money, ordered by the court to be so paid in.

*Hurd*, contra, the plaintiff has clearly a right to pursue

the decree of the court, notwithstanding default in paying in money ; besides the agreement to hear appeal and expedite proceedings was a waiver of contempt.

Wilson v. Bates, 9 Sim. 54 ; Bristowe v. Needham, 2 Ph. 190 ; Bradbury v. Shaw, 14 Jurist, 1042, were amongst the cases cited by the parties. After taking time to look at the authorities, the objection was now disposed of by

ESTEN, V. C.—I have looked at the authorities that were cited, and others, except Smith, 6th ed. 128-9. According to the best opinion I can form, I think the objection should be disallowed. It would seem that a defendant in contempt may do anything necessary to get rid of the contempt, and may do anything in resistance of the plaintiff's proceedings, although involving an active proceeding on his part, as filing exceptions, and setting them down to be argued ; or may complain of irregularity in the plaintiff's proceedings subsequent to the contempt, but cannot appear in court voluntarily in order to avail himself of any proceeding in the suit. On the other hand, it would appear that a plaintiff, notwithstanding that he is in contempt, may prosecute his suit, compel an answer, and the production of documents, and enforce a decree ; and the defendant must obtain an order staying proceedings until the contempt is purged. I consider the plaintiff in the present instance as prosecuting his suit or enforcing his decree ; I think he is entitled to be active, as proceeding under the reference, though made at the instance of the defendant. I am inclined to think, too, that the arrangement made for bringing the appeal to a hearing would furnish an answer to the objection ; but the facts are not sufficiently disclosed. I give no costs of the argument, as the practice is certainly new, and the authorities conflicting.

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CAMERON v. PHIPPS.

In moving for an order *pro confesso* after service effected upon the attorney of a judgment creditor, the affidavit of

service must follow the words of the act, and shew that the party sued appears as the attorney of the creditor on the roll of the judgment in respect of which he is made a party to the suit.—ESTEN, V. C.

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### BECKITT v. WRAGG.

*Appeal bond—Solicitor.*

It is irregular for a solicitor to become security for costs for his client.

In this suit the defendant had taken proceedings to bring the cause before the Court of Appeal, after the judgment given by this Court, as reported in 6th Grant's Chancery Reports, p. 454. The usual appeal bond had been filed, but the persons named as sureties being the solicitors for the appellant, a motion was now made by *W. Davis* to set aside the bond so executed, on the ground that the policy of the law is against permitting solicitors becoming sureties for their clients, and thereby, as stated by the Lord Chancellor, in *Panton v. Labertouche*, 1 Phil. 265, saving the solicitors themselves from the importunities of their clients.

*Doyle*, contra. No rule exists in this court, as at common law, that a solicitor shall not become bail for his client; and here no question arises as to the sufficiency of the security.

SPRAGGE, V. C.—There cannot be any doubt as to the goodness of the security, but that has not any bearing on the question before me, and although there is not, as stated by Mr. *Doyle*, any rule in this Court precluding a solicitor from becoming bound for his client, I have no doubt that, for the advantage of solicitors themselves, I cannot do better than adopt the view, suggested by the case referred to, and order the bond filed in this cause to be set aside.

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### McCARTY v. WESSELS.

*Absconding defendant.*

Where an order had been made, pursuant to the general orders of 1853, to advertise the defendant as absconding, and no further action had been taken thereon for nearly four months,

*Fitzgerald*, for plaintiff, applied to the judge in Chambers for an order to take the bill *pro confesso* against such defendant.

ESTEN, V. C., required an affidavit shewing that defendant had not returned within the jurisdiction, and that the plaintiff was still ignorant of his whereabouts, so that he was unable to serve him with notice of this application.

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#### FORBES v. CONNOLLY.

##### *Sequestration.*

Where it is necessary to proceed to a sale of property seized by sequestrators, notice of the application for an order for the purpose must be given.

In this case a writ of sequestration had been sued out by the defendant against plaintiff for non-payment of costs on dismissal of the bill. And an *ex parte* application was now made for an order directing the sequestrators to sell the property seized.

ESTEN, V. C.—This order is not obtained upon an *ex parte* application: notice of motion must be given.

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#### ELLIOTT v. HELLIWELL.

#### FEEHAN v. HAYES.

##### *Reference as to incumbrances—Office copy decree.*

In proceeding under the orders of February, 1858, to make incumbrancers parties to the cause, the plaintiff must serve the incumbrancers with office copies of the decree, duly stamped.

In these cases, the plaintiffs in proceeding upon the decrees made at the hearing, to make incumbrancers parties to the cause under the order of February, 1858, served unstamped copies of the decree. On the question being brought before the judge in Chambers, as to the regularity of the proceeding, ESTEN and SPRAGGE, V.C.C., held the proceedings irregular, the object of the order being that some duly authenticated document should be served upon persons sought to be made parties in the Master's office.

## FARRY v. DAVIS.

*Service out of jurisdiction.*

Where an application is made to serve a defendant out of the jurisdiction, and correspondence is relied upon to shew the party's residence, the affidavit must shew at what time the last communication had been received from the defendant.

This was an application for leave to serve two of the defendants in the State of Connecticut, the affidavit on which the application was founded stated that the defendants "are my brothers, and frequent correspondence by letter is had between them and myself, and other members of the family; such letters are directed to them at Danbury, aforesaid, and dated from that place in reply. If I wished to communicate with them by letter, I would direct to Danbury, aforesaid, in perfect confidence that such letter would reach them there."

SPRAGGE, V. C.—I think the affidavit should state when last any communication was received from the defendants at Danbury. For all that appears, it may have been a year or more since any letter was received from that place, and in the interval the defendants may have removed to a different part of the Union altogether.

## BROWN v. BAKER.

Where a plaintiff allows six months to elapse after service of the bill, before moving for an order *pro confesso* for want of answer, notice of the application must be given to the defendant.

This was an application to take the bill *pro confesso* for want of answer, under the orders of 1853. By order XIII., sec. 1, the Registrar is to draw up an order *pro confesso* upon precipice, within two months from date of service of bill. After that time a motion must be made to the court *ex parte* for the order. In this case the office copy of the bill had been served on the defendants during the months of March and May last; and now

*R. Martin* moved for an order to take the bill *pro confesso* for want of answer.

SPRAGGE, V. C.—The judges have determined that after six months from the service of the bill, any application to take it *pro confesso* must be made upon notice.

## CRAWFORD V. POLLEY.

*Answer sworn out of jurisdiction.*

An answer sworn out of the jurisdiction without a commission having been issued to take the same, is irregular.

This was an application for an order to file the answer of the defendant Polley, notwithstanding an irregularity in its transmission. It appeared that the answer had been sworn before the mayor of New York, but no commission had been issued for the purpose. *Hodgins*, contra, was willing to waive the irregularity of transmission, but doubted if the answer was good, having been sworn before an office copy of the bill had been served.

ESTEN, V. C.—I do not think that can create any difficulty, but as the answer has been sworn before the mayor of New York, without any commission having been sued out for the purpose, it is not such a pleading as I can order on the files of the court, unless the plaintiff will consent to take an answer without oath.

## STRACHAN V. DEVLIN.

*Foreclosure—Staying proceedings.*

Where a decree of foreclosure obtained upon a mortgage payable by instalments, has been stayed upon payment of the amount actually due, and a subsequent default occurs, the proper order to make is to direct the whole sum secured to be paid, with liberty to the defendant to pay the sum actually due, and stay proceedings thereon.

In this case a decree of foreclosure had been made for payment of money secured by a mortgage, payable by instalments; subsequently a stay of proceedings took place upon payment of the amount of principal and interest then due. Since which time another gale of interest had fallen due; and now *Roaf*, for plaintiffs, moved to appoint a new day for payment. On behalf of the defendant, it was asked that he might be permitted to pay the amount of interest actually due.

ESTEN, V. C.—I think that the proper order is to direct the whole sum to be paid, with liberty to defendant to pay what shall be found to be now payable, and stay proceedings upon such payment being made.

## THOMAS v. TORRANCE.

*Receiver suing for debts.*

Where a receiver appointed to manage an estate finds it necessary to sue for debts due to it, an application for permission to do so must be made, supported by affidavits shewing the expediency of instituting such proceedings.

In this case a Receiver had been appointed to wind up the partnership business that had for some time existed between the plaintiff and defendant, and get in the debts due to the partnership.

*McGregor* for plaintiff now applied for an order authorizing the Receiver to take proceedings against the persons indebted to the partnership for the purpose of enforcing payments of the amount due by them, and apply the same, when got, into paying off the claims against the partnership. The defendant assented to the application.

**SPRAGGE, V. C.**—The usual course is for the Receiver to specify certain debts which it is thought advisable to proceed at law for the recovery of. Let a schedule of the accounts due the firm be made out; on the production of that, together with an affidavit from the Receiver, stating his opinion as to the advisability of taking proceedings; and if it shall appear that it would be for the benefit of the estate to incur costs in enforcing these claims, permission may be given.

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[November 24.

**ANONYMOUS.**

*Married woman's answer.*

Before an order will be made for a married woman to answer separate from her husband, it must be shewn that an office copy of the bill has been served upon her, and that she is in default for want of answer.

In this case an application was made for an order that one of the defendants, *Hannah Paul*, might answer separately and apart from her husband. It appeared that the bill had not been served upon her.

**SPRAGGE, V. C.**—Refused the application, as it is necessary to shew the party in default for want of answer, before this order can be made.

## IRVINE v. WHITEHEAD.

*Mortgage—Sale.*

On moving for an order absolute to sell for default of payment of the sum found due by the Master—it need not be shewn that any incumbrancer besides the plaintiff attended at the time appointed by the Master for payment of the several incumbrancers.

In this case a reference as to incumbrances had been made to the Master at Hamilton, and the mortgage estate was directed to be sold in default of the mortgagor paying the claim of the plaintiff, and such sum as the Master should find due to other incumbrancers.

*C. Crickmore*, for plaintiff, now moved for a final order for selling the mortgage estate for default in paying the amount found due to him. It appeared that several of the incumbrancers had failed to attend at the time and place appointed by the Master for payment of their demands, and a doubt was suggested, whether, being shewn, to be in default for non-payment of the plaintiff's claim only, there had been such a default as would justify the court in selling the premises. After taking time to look into the practice, SPRAGGE, V. C., directed the order to go.

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[November 26.

## COTTON v. CORBY.

*Order to prove depositions.*

A party is entitled to have an order upon precipe, to prove *viva voce* at the re-hearing of a cause depositions which had not been used at the original hearing.

In this case a decree had been drawn up dismissing the bill as against all the defendants except *Gildersleeve*, the plaintiff's petitioned, and the cause was set down for re-hearing. Application was made to the Registrar, to draw up an order giving to the plaintiffs liberty to prove certain depositions taken before the cause was at issue, *viva voce* at such re-hearing, which that officer declined doing without the direction of the court. Upon the question being mentioned in chambers, SPRAGGE, V. C., thought the order might be drawn up on precipe, saving all just exceptions.

[November 19.

## WHITE v. COURTNEY.

*Correcting Master's report—Clerical error.*

In taking an account of mortgage money and interest, the Master computed interest up to the 19th of March, but by some error in preparing his report, the money was appointed to be paid on the 19th of January. Upon the application of the plaintiff, *ex parte*, this error was ordered to be corrected.

This was a suit to foreclose; a reference had been made to the Master to compute interest on the principal money due up to six months after date of report, being the 19th of March, 1859, but by some mistake, the Master, in drafting his report, made the money found due payable on the 19th of January, 1859, the same error being also carried into the engrossment of the report. Upon discovering the mistake,

*Barrett*, for plaintiff, moved *ex parte* for an order to correct the report, by inserting the proper date therein, for payment of the money, as being a clerical error in making up the report.

SPRAGGE, V. C.—Under all the circumstances no doubt can exist that the mistake suggested has by some means crept into the report, thus materially shortening the time allowed to defendant to redeem, therefore let the order go, as asked for.

[November 19.

## CONNELL v. CURRAN.

*County court—costs.*

When a plaintiff files a bill in this court to foreclose a mortgage for a sum within the jurisdiction of the county court, no costs will be allowed him, the fact that the defendant is resident in a county other than where the land is situate, will not vary this rule.

This was a foreclosure suit, and the usual decree had been pronounced. On proceeding to take the account and tax costs, it appeared that the sum due upon the foot of the security was considerably under the amount for which the county courts have jurisdiction under the provisions of the statute, 16 Victoria, chapter 119, and the taxing officer refused to allow the plaintiff any costs of suit; and now

*Fitzgerald* moved for an order directing the allowance of

full costs to the plaintiff. The land is not situate in the county in which the defendant resides ; by sec. 23 of the 16th Victoria, all county court acts are embodied therein, and constitute but one act ; and by the previous acts the judge's jurisdiction is restricted to his own county. An order for possession can only be made by the judge in his own county. Again, by 18 Victoria, chapter 127, registration of decrees of the Court of Chancery is provided for, not decrees of any county court ; a purchaser, therefore, would be obliged to search every county court office to be sure a decree of foreclosure had not been pronounced affecting the property he is about to purchase.

After taking time to look into the provisions of the several statutes, SPRAGGE, V. C., refused to make the order.

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#### FARRELL v. CRUICKSHANK.

*Commission before order for administration.*

After notice of motion served for an order to administer the estate of an intestate, a commission may be obtained for the examination of witnesses with a view of establishing the fact that the party applying for the order is one of the next of kin of the intestate.

Proceedings had been first instituted about eighteen months ago, for the purpose of obtaining an order to administer the personal estate of the late *Alexander Wood*, in this country ; and a guardian *ad litem* had been appointed for the defendant upon the application of the plaintiff. On moving for the usual administration order, it was objected that it did not appear that the plaintiff was one of the next of kin, and thus entitled to the order asked for ; and now—

*Roaf*, for plaintiff, moved upon notice for an order that a commission might issue directed to persons resident in Scotland, empowering them to take evidence there for the purpose of establishing the fact of her being the next of kin of the deceased.

*Turner*, contra, objected that as yet there was no suit in court ; that testimony taken under such circumstances would not be binding, as witnesses swearing falsely would not be liable to be prosecuted for perjury ; but SPRAGGE, V. C.,

thought the proceeding by notice had been introduced by the court in lieu of a bill, and that therefore the order should go in the usual form.\*

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### NEVIEUX v. LABADIE.

*Order to deliver up possession.*

In moving to commit for a contempt in not delivering possession of mortgage premises in obedience to an order made in pursuance of Order XXXII., of 1853, it must be shewn that the possession was demanded.—ESTEN, V. C.

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### GOODHUE v. CARTER.

*Foreclosure—Costs.*

It is not proper that a mortgagee should create unnecessary expense against the mortgagor, by executing several powers of attorney.

This was a motion for the final decree of foreclosure against two of the defendants, judgment creditors of the mortgagor, separate days were by the decree appointed for each of these parties to pay the amount found due to the plaintiff; and the plaintiff had given two separate powers of attorney authorizing his agent to attend on each of the days to receive the money from the defendants.

THE CHANCELLOR granted the application, but could see no good end that was to be attained by the plaintiff having given two separate powers of attorney, unless it was to increase the costs of the suit, which the mortgagor would ultimately be compelled to pay, or lose his estate.†

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\* NOTE.—*Turner* appealed from this decision to the full court; when the view of the Vice-Chancellor was sustained by the other members of the court.

† It is presumed that, after this expression of his Lordship's opinion in future such costs would not be allowed in taxation, whatever may have been the practice hitherto pursued by the taxing officers.

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[December 15.

## KERR v. CLEMMOW.

*Pro confesso.*

Defendants had been served out of the jurisdiction with an office copy of the bill, upon an order obtained for that purpose, and after more than six months had elapsed, the plaintiff moved *ex parte* for an order *pro confesso*, under the circumstances the order was made.

This was an *ex parte* application for an order *pro confesso* as against the defendants J. C. Clemmow and J. H. Bloor. It appeared that the bill had been served upon them at Oswego, in the State of New York, in the month of May last, pursuant to an order granted in that behalf.

It was suggested that the long vacation having intervened, and the service having been effected out of the jurisdiction in a foreign country, afforded sufficient ground to warrant the order now asked being made, without requiring notice of the application to be given.

THE CHANCELLOR, under the circumstances, made the order.

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[December 18.

## ROAF v. TOPPING.

*Suing on bond for security for costs.*

This was an application by the defendant to be at liberty to sue on the bond given in this case for security for costs, the plaintiff being resident out of the jurisdiction. SPRAGGE, V. C., required the decree to be produced, to shew that the defendants were ordered to receive their costs.

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[December 20.

## STOKES v. CRYSLER.

*Suing on bond for security for costs.*

This was an application for liberty to sue upon the bond given to secure the payment of the costs of an appeal brought by the defendant against a decree of this court. ESTEN, V. C., required the party moving to shew a demand from, and refusal of the costs by, the sureties named in the bond, before making the order asked.

[December 1.

## PORTER v. GARDNER.

*Sheriff—Order to return papers.*

In moving for an order upon a sheriff to return papers sent to him for service, the proper mode of proceeding is to give notice of motion—but *quære*, whether a sheriff can be compelled to serve any papers other than process issuing from the court.

This was an application by *Blake* for an order *nisi* on the sheriff of the county of ———, to return an order for the payment of costs, which had been sent to him for service on the defendant; but

THE CHANCELLOR.—I doubt if this is the proper course to adopt. In this court a notice of motion answers the purpose of an order *nisi* at common law; the proper proceeding will therefore be, to give notice that unless the order is returned by a day to be named, a motion will be made for an order that the sheriff do return it; although, even then, I do not feel clear that any order can be properly made, as I incline to think that the sheriffs are only bound to serve the process of the court; and the parties to the cause, or their solicitor, can effect service of all other papers. One would suppose, however, that the fees payable for the services would be sufficient inducement for those officers to act, without stopping to consider whether they are bound to do so or not. In the present instance the difficulty can be easily obviated, by the plaintiff taking out a duplicate order, if the sheriff refuses either to serve or return the original.

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RE STANNARD, INFANTS.*Appointment of guardian to infants.*

The provisions of the recent statute, 22 Victoria, chapter 93, have not the effect of excluding the jurisdiction of this court, in respect to the appointment of guardians to infants.

In this matter an application had been previously made for the appointment of a guardian to these infants, on that occasion a doubt was suggested by the judge as to whether the right to appoint guardians to infants was not now vested in the surrogates of the several counties throughout the province,

and the application was directed to stand over, for the purpose of having that point spoken to. The application was now renewed by

*Brough*, for the petitioners. The act of 22 Victoria does not expressly exclude the Court of Chancery, which has always entertained jurisdiction for the appointment of guardians to infants. Chancery having exercised jurisdiction in any case not cognizable at common law, is not ousted of that jurisdiction by an act subsequently being passed giving to common law courts authority to adjudicate upon similar cases; the rule being that equity having once exercised a jurisdiction cannot be deprived of that power otherwise than by an express and positive enactment of the legislature. The appointment spoken of in the statute by the surrogate judge is intended to exclude other appointments by other surrogates.

After taking time to look into the question, *SPRAGGE*, V. C., thought this court still had a power of appointment, and made the order as asked.

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#### CITY OF TORONTO v. MCGILL.

*Cause set down by defendant.*

Where a defendant set down a cause for hearing before the time limited by the orders of 1853, in that behalf, and the plaintiff moved to strike the cause out of the list of cases for hearing, for irregularity, the case was ordered to be struck out with costs; notwithstanding that by the delay on the part of the plaintiff's solicitor to give notice of the irregularity, the defendant was unable to set the cause down again for the ensuing hearing term; although had the matter been *res integra* the application would have been refused.

By section 4 of the 25th of the orders of June, 1853, it is directed that "if the plaintiff neglects to set down the cause to be heard within one month after publication has passed, any defendant may cause the same to be set down, and may serve notice of hearing on the parties to the cause." In this case the defendant, professing to act under this order, had the suit set down to be heard at the sittings, to commence on the seventh day of November, but through inadvertence on the part of the agent, took this proceeding one day before

the expiration of the month allowed to the plaintiff to set the cause down ; and served notice of hearing on the 16th of October ; of this the solicitor for the plaintiffs took no notice until the 27th of the same month, when notice of the present motion was served ; and now

*Taylor*, for the plaintiffs, moved to strike the cause out of the list of cases set down for hearing at the ensuing sittings, on the ground of irregularity, in setting the same down too soon.

*Turner*, contra, objected that plaintiffs were bound by the delay which had occurred in moving ; that the notice, if irregular, should have been returned to the defendant's solicitor, or notice given at an earlier day of the objection now taken ; had immediate notice been given, the defendant could have set the cause down again at the proper time. On a subsequent day, upon a suggestion from the court, counsel for the plaintiff contended that the notice of hearing is analogous to a notice of trial at common law ; there a defendant may move even after verdict to set aside an irregular notice of trial. *Cotton v. Thompson*, 5 Jur. 270 ; *Wood v. Harding*, 3 C. B. 968. A party objecting to any proceeding on the ground of irregularity, has all the time to move that he is allowed to take his next proceeding : thus, to a writ of summons till the time for appearing, or to a declaration till the time for pleading. *Child v. Marsh*, 3 M. & W. 433 ; *Edwards v. Collins*, 5 Dow. P. C. 228 ; *McLean v. McDonald*, 3 U. C. Q. B. 126 ; *Hinton v. Stevens*, 4 Dow. P. C. 283.

ESTEN, V. C.—If this matter were *res integra* I should refuse this motion, on the ground that the plaintiffs by delaying their application for eleven days after receiving the notice had waived the irregularity complained of ; but the cases which have been cited shew that the rule at common law is less strict in a case which appears to me to be strictly analogous, and I cannot act here on a more stringent rule than courts of common law would apply to an analogous case. I therefore think that the application must be granted with costs ; but in strictness, as this point was not suggested in

argument, but by the judge, and the cases which were cited, were furnished after the argument, the defendant should be at liberty to furnish any other cases if they exist.

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PETERBOROUGH v. CONGER.

*Pro Confesso—Service on Solicitor.*

[November 6.

An office copy of the bill had been served on the solicitor of one of the defendants, who gave an undertaking to put in an answer, or in default that the plaintiffs might proceed to take the bill *pro confesso without further* notice being given of the proceeding; the order was made accordingly.—[ESTEN and SPRAGGE, V. CC.]

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KINGSTON v. MONGER.

*Serving bill out of jurisdiction.*

[Dec. 4, 1858.

An application for an order to serve a defendant out of the jurisdiction, at Iowa, was refused; the affidavit upon which the motion was founded merely stating that letters had been received from the defendant dated at that place, but did not shew that he was resident there.—[THE CHANCELLOR.]

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RICHARDSON v. MOSER.

*Dismissing bill—Setting down cause.*

[Dec. 14.

A plaintiff having set down his cause to be heard, subsequently countermanded the notice of hearing which had been served upon the defendant: a motion to dismiss for want of prosecution was, under the circumstances, refused without costs.

This was a motion made on a former day, to dismiss for want of prosecution. It was shewn that the plaintiff had set down the cause for hearing at the sittings in November last as required by the terms of order XXV., sec. 4, (orders 1853), but subsequently countermanded the notice of hearing, and struck the cause out of the list of cases for hearing: under these circumstances it was contended that the steps which

had been taken by the plaintiff were a mere evasion of the order, and warranted the present application being made ; the plaintiff having set down the cause prevented the defendant taking the steps pointed out by the order.

THE CHANCELLOR doubted if under any circumstances the plaintiff has a right to countermand the notice of hearing, or if defendant has not a right notwithstanding such countermand to go to a hearing of the cause, but took time to look into the practice. And this day his Lordship refused the application, but, under the circumstances, without costs.

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### MOODIE v. THOMAS.

*Solicitor's lien—Producing papers.*

[Dec. 23, 1858.

The rule that a solicitor is bound to produce documents subject to any lien he may have upon them, does not apply when the person asking for their production is the party to pay the amount claimed.

From the affidavits filed, it appeared that the plaintiff in this cause had been sued by the defendant upon a covenant contained in an assignment of a mortgage by way of payment for a vessel sold by Thomas to Moodie, whereby Moodie bound himself to make good the amount intended to be secured by the mortgage in the event of the mortgagor failing to pay. Upon giving instructions to his attorney to defend that action, Moodie had placed in his attorney's hands a letter written by Thomas to Moodie, in which it was alleged Thomas had agreed to take the mortgage as payment, without any covenant from Moodie. The present suit was instituted to correct the assignment, and a motion being about to be made for an injunction to restrain proceedings at law, the plaintiff was about to proceed to examine the attorney, and had served him with a subpoena *duces tecum* requiring him to produce the letter. This the attorney declined doing until paid his costs of the action at law ; and a motion was now made by

*Blevins* for an order that the attorney should produce the letter for the purpose of the examination, referring to *Thompson v. Morley*, 5 Car. and Pay. 501.

*Doyle*, contra, referred to Taylor on Evidence, volume I., page 406, and cases there cited, to shew that under the circumstances of this case, the attorney would not be compelled to produce documents in his hands until the lien was paid.

ESTEN, V. C.—The passage cited in Taylor on Evidence is clear to shew that the client cannot compel the production, although another person may—*Kemp v. King*, 2 Moo. & Rob. 437, is to the same effect; and so is *Hope v. Liddel*, 24 Law Journal, 691; *Thompson v. Morley*, merely shews that the witness cannot refuse to produce a document upon which he has a lien, at the instance of a third party, without prejudice to his lien. It is admitted that Mr. *Carroll* acquired a general lien on this letter the moment it was delivered to him by the plaintiff for the purpose of his defence to the action, because he accepted it upon that ground; but this is a different suit, instituted in a different Court, and intrusted to a different solicitor, in order to have the covenant expunged from the deed. Mr. *Carroll* could not refuse to produce the letter at the instance of a third party without prejudice to his lien; but he cannot be compelled by the party against whom the lien is claimed, to produce it for the purposes of a different suit, in which he has accepted no retainer. The application must be refused with costs.

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#### CONNOLLY v. MONTGOMERY.

*Amendment—Vacation—Computation of time.*

[January 17.

The time appointed by the court for vacation at Christmas, is not excepted in the computation of the time allowed for amending the bill. The fifth of the orders of 1853 having reference to the long vacation only.—[Per SPRAGGE, V. C., after consulting with the other members of the court.]

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## NOTTER v. SMITH.

*Injunction—Costs.*

[January, 21.

A party acting in opposition to the terms of an injunction was refused his costs of resisting a motion to commit for contempt; although at the same time the injunction was dissolved upon the application of the defendant, as having been granted improperly. The duty of a defendant served with a writ being to act in accordance with it as long as it exists.—[SPRAGGE, V. C.]

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## MAVETY v. MONTGOMERY.

*Specific performance—Delivery of possession.*

[January 27.

The XXXII. of the orders of 1853, authorizing the court to grant an order for the delivery of the possession, does not apply where the bill in a suit for specific performance is dismissed at the hearing.

This was a suit for the specific performance of a contract for sale by the defendant to the plaintiff, alleged by the plaintiff to have been entered into between the parties. The defendant denied the contract, asserting that the agreement was for lease only, and that he had accordingly let the plaintiff into possession of the premises. At the hearing the bill was dismissed, but without costs; and in a suit brought by Montgomery against Mavetty to restrain the cutting of timber, a perpetual injunction was ordered without costs. The plaintiff in this suit refused to give up possession of the premises in question; and a motion was now made by Blevins for an order upon the plaintiff to deliver up possession to the defendant; but SPRAGGE, V. C., refused the application; the order under which this application is made referring only to mortgage cases; and the remedy thereby given being intended in lieu of the action of ejectment, which a mortgagee out of possession is prevented from bringing, at the risk of the costs of his proceedings in this court.

## MCDONALD v. MCDONALD.

[February 4.

*Semble*—That the bail of a defendant who has been arrested upon a writ of *ne exeat*, cannot be discharged from their bonds upon the defendant rendering himself to the custody of the sheriff.

This was an application by *McDonald* on behalf of the bail for the defendant, who had been arrested upon a writ of *ne exeat*, for an order, that, upon the defendant being placed in the custody of the sheriff, the bail-bond might be cancelled, and certain mortgages and notes of hand given as collateral security, might be delivered up to the bail, referring to 1 *Dickens*, 95.

*Blake*, contra, objected that bail had not the power of rendering their principal, as at common law.

On a subsequent day SPRAGGE, V. C., referred to *De Carriere v. DeCallone*, 4 *Ves.* 577; *Hovenden's note 8*, as shewing, that to say the least, it was doubtful if the bail could render their principal, who had been arrested under a writ of *ne exeat*. If counsel thought any authority could be found in favour of the application, he would hear them on the point.

[No further application had been made up to the 28th of February, when his Honour refused the application with costs.]

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## DEXTER v. COSFORD.

*Lis pendens.*

[February 5.

Where a certificate of *Lis pendens* has been registered under the statute, and the bill is afterwards dismissed, it is not necessary to obtain an order discharging the certificate of *lis pendens* from the registry. The registration of the decree dismissing the bill being sufficient for all purposes.  
—[SPRAGGE, V. C.]

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## MONRO V. KEILEY.

*Service on Attorney of Judgment Creditor.*

[February 8.

The act 20 Victoria, chapter 56, section 14, applies only to cases of foreclosure or sale by an incumbrancer.

This was a bill for specific performance, and in default of payment of the purchase money, a sale of the property contracted for, and that the defendant might be ordered to pay any deficiency arising upon such sale. The plaintiff had made several judgment creditors of the defendant parties, by serving the attorneys on record; and they having failed to answer, *S. Blake*, for the plaintiff, now moved for an order to take the bill *pro confesso* against them; but

SPRAGGE, V. C.—The section of the statute under which this application is made, applies in express terms to suits instituted by mortgagees, persons having charges on real property and judgment creditors for the foreclosure or sale of any property; and this plaintiff cannot be said to fill any one of these characters; it was suggested that he might properly be looked upon as a person *having a charge* on this property, but that clearly is not so, he has in fact the estate itself. The motion must therefore be refused.

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## TAYLOR V. BOSTWICK.

*Witness to award, bound to prove it.*

[February 10.

This was an application by *English* for an order to compel the witness who attested the execution of the award made in this cause, to attend and make affidavits of the execution thereof. Affidavits were read stating that upon being applied to for the purpose, the witness had refused to make the necessary affidavit, although a commissioner had waited upon him for the purpose of administering the oath. *Clark v. Elwyn*, 10 Mod. 352, S. C. 1 Str.; *Weston v. Walker*, 1 Price, 308; *Russell on Awards*, 389; were cited.

*Barrett*, contra, read an affidavit shewing that the refusal of the witness to make the required affidavit, arose from the fact of certain moneys required to be paid by the plaintiff not having been so paid; but that these sums had been since paid, and the witness was now prepared to make the affidavit.

SPRAGGE, V. C., doubted if the reason assigned was sufficient to justify the witness in refusing to do what he was clearly bound to do—prove the instrument to which he had set his name as a witness. However, as the objection has been removed, and the witness is now prepared to make the affidavit required of him, it will not be necessary to make any order upon this application.

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#### ALCHIN V. BUFFALO.

[February 11.

It is not necessary to obtain an order for the transmission to the office of a master in an outer county, by the master in Toronto, of papers brought into his office. As the master will do so upon the precipice of the party requiring the papers to be transmitted.—[SPRAGGE, V. C.]

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#### BERNARD V. JARVIS.

*Partition suit—Costs.*

This was a suit for partition, and in drawing up the decree the parties had omitted to have inserted a direction to tax the costs as between solicitor and client, or to apportion them amongst the several parties according to their respective interests; and *Cattanach*, on behalf of the plaintiffs, now moved for an order directing the master to do so upon the taxation. SPRAGGE, V. C., made the order to apportion the costs, as that would effect a proper carrying out of the decree pronounced; but refused the order for taxation as between solicitor and client, that being a variation of the decree, which could properly be done on a re-hearing only.

## FENTON V. CROSS.

[February 12.

Where a cause stands over at the hearing for the purpose of adding parties, the plaintiff has not a right to amend by changing the venue; but a defendant having delayed unreasonably in making his application, a motion to take the amended bill off the files for irregularity in having been thus amended, was refused without costs.—[SPRAGGE, V. C.]

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## CHERRY V. MORTON.

*Supplemental Answer.*

[February 14.

A defendant filed his answer in October, 1857, and in August, 1858, plaintiff filed a replication. An application by the defendant in February, 1859, to be allowed to file a supplemental answer for the purpose of setting up certain grounds of defence omitted from, but not in anywise contradicting, the original answer, was granted on payment of costs, and the defendant's undertaking to go to a hearing at the next term.

After the cause had been put at issue and set down for the examination of witnesses, it was discovered by the counsel employed by the defendant to conduct the examination, that certain grounds of defence which the defendant had a right to rely upon, and were material for his defence, had not been raised by the answer, the solicitor who had been conducting the defence not deeming it necessary to set them up. *A. Crooks* now moved upon affidavit for an order giving the defendant permission to file a supplemental answer. *Taylor*, contra, objected delay in applying, and referred to Daniell's *Chan. Prac.*, 621, 624; but SPRAGGE, V. C.—It would be hard to make the defendant suffer for a mere inadvertence on the part of his solicitor; and as the defendant undertakes to proceed with the examination go to a hearing at the ensuing term, and pay the costs of this application, the safer course will be to let the order go.

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## CORBETT V. MEYERS.

*Contempt—Costs of.*

[February 19.

A party who was in contempt to an attachment for not bringing accounts into the master's office for the purpose of a reference, afterwards filed the same with the master, but neglected to pay the opposite party the costs of the proceedings to put him into contempt, and a motion was now made *ex parte* for an order to remove the accounts so brought in from the files in the master's office, in order that the party might be proceeded against for the contempt. The order was granted accordingly.—[SPRAGGE, V. C.]

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## ATTORNEY-GENERAL V. BRANTFORD.

*Corporations—Contempt—Sequestration.*

In proceeding against a corporation to enforce obedience to a decree or order, it is not necessary to sue out a writ of *distringas*; the proper mode of proceeding is, by orders *nisi* and absolute for a sequestration.—[*Per Curiam*.—SPRAGGE, V. C., *dubitante*.]

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## MURNEY V. KNAPP.

*Substitutional service—Absconding defendant.*

[February 24.

In moving for an order for substitutional service of an absconding defendant, or for an order to advertise him, the affidavit on which the motion was made, stated that the *deponent had made enquiries and exertions to serve the defendant, but had been unable to do so*. The motion was refused, as the affidavit ought to show what exertions had been made, so that the court or judge may be enabled to determine whether or not the defendant is absconding, or that it would be proper to dispense with personal service.—[ESTEN, V. C.]

## MAXWELL V. MAXWELL.

*Alimony—Condonation.*

Where the plaintiff in an alimony suit after an order for interim alimony had been made, returned to her husband's house, and resided there for some time, but was afterwards obliged to leave by reason of cruelty; a motion to set aside the interim order on the ground of condonation, was refused, with costs.

This was a motion by *Doyle*, for defendant, to set aside the order for interim alimony which had been made; the affidavit of defendant stated that the plaintiff had returned to reside with defendant, and had continued to cohabit with him for about two or three weeks, when the plaintiff left again of her own accord, after having on several occasions behaved in a violent and improper manner.

*Blevins*, for the plaintiff, read her affidavit, wherein she admitted that she had returned to reside with the defendant at his urgent solicitation, and upon his assurance that he would in future refrain from any ill treatment of the plaintiff; but swore that having so resided with him for some days, he resumed his former ill-treatment of her, behaving in such a violent manner towards her, that she became alarmed as to her safety, in consequence of which she had been compelled to leave the house of the defendant, and that her so leaving was not from choice, nor was it caused by any misconduct on her part, as alleged in the affidavit of defendant. THE CHANCELLOR refused the application, with costs.

## HOWARD V. MACARA.

[February 23.

*Enlarging time for payment of mortgage money.*

In opposing a motion to enlarge the time for payment of mortgage money, found due by the Master's report, the mortgagee swore that in consequence of non-payment by the mortgagor, he had been obliged to raise money to meet liabilities of his own at a rate much beyond the rate payable under the mortgage; on granting the extension, the mortgagor was required to pay such a sum, in addition to the rate reserved by the mortgage, as would cover the interest payable by the mortgagee.

This was an application by *Strong*, on behalf the mortgagor, to extend the time for payment of the amount of principal, interest, and costs, found due by the master's report. The defendant in his affidavit, upon which the motion was

grounded, swore that he had been unable to raise the required amount, notwithstanding he had exerted himself to do so, owing to the general depression in the country; that large amounts were due him from several persons, which he expected to get in if time were afforded him for that purpose; and that the mortgage premises were of much greater value than the amount secured on them.

*Blake*, contra, read the affidavit of the plaintiff, stating that in consequence of the non-payment of the money due by the defendant, he had been compelled to effect a loan for the purpose of meeting his liabilities to others at the rate of 16 per cent; and that if the present application were granted, it would operate greatly to his injury.

**SPRAGGE, V. C.**—Since the orders of 1850 the rule generally acted upon has been that the time appointed for payment of the mortgage money will not be enlarged. Instances, however, have since arisen where it has been enlarged under special circumstances. In the present case it is shewn that the defendant has been making endeavours to raise the money, but in consequence of the depressed state of the country, he has failed in doing so, and the only injury that is suggested as at all likely to result to the plaintiff by granting an extension, is the loss of the interest in excess of the rate payable by the defendant to him. This, however, the defendant is willing to obviate by payment of any such excess, and as the law now stands, I see no objection to the court making such an order as will protect the plaintiff from loss.

The order, therefore, to be drawn up on the present application will be, that upon payment within one month of the amount of interest and costs found due by the master's report, and costs of this application, together with the sum of £7 10s, the time limited for payment of the amount of principal and subsequent interest be enlarged for three months from this date.

[In a subsequent case of *Smith v. Heron*, His Honour V. C. *Esten*, on the 21st March, made an order extending the time of payment for three months, the affidavit of the defendant shewing that from a particular source he anticipated

receiving funds wherewith to discharge the mortgage ; requiring the defendant, within 10 days, to pay the interest and costs found due.]

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IN RE MARSHALL.

FOWLER v. MARSHALL.

[March 2.

*Administration order—Evidence.*

Notice of motion for an order to administer the estate of — Marshall deceased, who died intestate, had been served on his widow, Elizabeth Ann Marshall, as administratrix, the application was refused, there not being any evidence produced shewing that letters of administration had been granted to her—[SPRAGGE, V. C.]

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COZENS v. McDUGAL.

[March 4.

*Appeal from Master's report after 14 days.*

By section 17 of the XLII. of the orders of 1853, reports of the master became absolute in fourteen days from the signing thereof, unless previously appealed from ; but where the fourteen days so given had been allowed through oversight to expire before giving notice of appeal, leave to do so was granted on payment of the costs of the application.— [SPRAGGE, V. C.]

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IN RE FORRESTER.

MESSNIER v. FORRESTER.

[March 5.

*Administration suit—Delay.*

In 1855 a motion had been made, upon notice, for an administration order, under the orders of 1853, since which no step has been taken in the matter, and an application was now made to the judge in chambers for a direction that the registrar should draw up the order, but the application was

refused; the cause having been allowed to sleep for four years, all parties were required to be served with a new notice.—[SPRAGGE, V. C.]

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### SHEA v. FELLOWES.

*Attorney-General—Pro confesso.*

Where the Attorney-General is a party defendant to a suit, and does not put in an answer, the proper course is to obtain an order that he do answer within a week, or in default, that the bill be taken *pro confesso* against him.—[SPRAGGE, V.C.]

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### CAMPBELL v. CAMPBELL.

[March 7.

*Re-hearing—Staying proceedings in Master's office.*

After carrying the decree into the master's office, the plaintiff was proceeding to take the accounts directed thereby, (See *Grant's Chancery Reports*, volume VI., page 600,) the defendant presented a petition of re-hearing, which was ordered, and the cause set down in the usual manner, whereupon a motion was made to stay further proceedings in the master's office, until after the cause had been reheard.

SPRAGGE, V. C., refused to stay the taking of the account, but intimated no report need be signed, the defendant using due diligence to have the cause re-heard.

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### CHANCE v. HENDERSON.

[March 16.

*Demurrer—Amendment—Examination of defendant.*

After a demurrer had been argued, and the court, instead of allowing the demurrer, gave the plaintiff liberty to amend on payment of costs; an application by the plaintiff for a commission to examine the defendant in Lower Canada, without having amended his bill, was refused with costs.—[THE CHANCELLOR.]

## LARKIN v. ARMSTRONG.

*Appeal from Master's report—Waiver.*

A party had delayed, for one day beyond the time allowed for that purpose, to give notice of an appeal from the master's report, and the other side, instead of moving to set the proceedings aside, served notice of a cross-appeal. *Held*, that he had waived the irregularity.

By the master's report executors were found indebted to the estate, one of whom, being dissatisfied with the finding of the master, gave notice of appeal to the plaintiff, but did not serve any notice of appeal on the other executor. *Held* irregular, and that a special application would be necessary to be allowed to give notice of the appeal, after the regular time for so doing. The fact that the interest of the party not served was the same as the party appealing, made no difference in respect to his right of being present upon the argument of the appeal.—[THE CHANCELLOR.]

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## DICK v. McNAB.

[March 25.

*Attachment—Abstract of title.*

On moving to make an order *nisi* for not delivering an abstract of title absolute, it is necessary to shew that it has not been delivered to either party named in the order.

In this case an order *nisi* had been served requiring the defendant within four days after service to deliver to the plaintiff or his solicitor an abstract of default, or in default, that an attachment should issue. No abstract having been delivered,

*Roaf*, for the plaintiff, now moved the order absolute, the affidavit on which he moved was made by the solicitor of the plaintiff, who swore to the non-delivery of any abstract to him.

*S. Blake*, contra, objected that no affidavit was produced, shewing that the abstract had not been delivered to the plaintiff himself; and read an affidavit of the defendant's solicitor, stating facts which he contended shewed that an abstract had been waived by the plaintiff; but

THE CHANCELLOR.—Whatever effect may be given to the acts of the plaintiff, it is not necessary now to discuss them, as in the absence of an affidavit from the plaintiff negativing the receipt by him of an abstract, it is impossible for me to order the defendant to be attached. The motion must therefore be refused.

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TOWERS v. FOOT.

[March 26.

*Dismissing bill for want of prosecution.*

After notice of motion to dismiss for want of prosecution had been served, the plaintiff set the cause down to be heard by way of motion for decree, and served notice on the defendant. *Held*, a sufficient answer to the application, but that the defendant was entitled to his costs, he having been in a position to give the notice of motion to dismiss.—[THE CHANCELLOR.]

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BEAMISH v. POMEROY.

[March 29.

*Revivor—Infant heir of plaintiff.*

Where the plaintiff in a redemption suit died before the decree pronounced had been drawn up, leaving infants his real representatives. *Held*, that before an application to revive could be made, the decree must be drawn up, and a guardian *ad litem* appointed.

This was a redemption suit, and a decree, as reported in *Grant's Chancery Reports*, volume VI., page 586, had been pronounced in favour of the plaintiff, but before any decree was drawn up, the plaintiff died intestate, leaving two infant daughters, his co-heiresses at law, and his widow, to whom letters of administration of his goods and chattels had been granted, surviving him.

No proceedings having been taken to revive on behalf of the infants, a petition was presented by the defendant, setting forth the fact of the bill having been filed, and a decree having been pronounced. That the plaintiff had departed this life on the 9th January, 1858, intestate, leaving Margaret Ann Beamish, and Catherine Cecelia Beamish, infants, his

children, him surviving; also, the granting of letters of administration to the widow; the prayer was, that the suit might be revived, and stand in the same plight and condition as at the death of the plaintiff; and

*Crickmore* on a former day asked the same to be fiatied by His Lordship the *Chancellor*, in the usual way, when some doubt being entertained as to the proposed mode of proceeding, His Lordship took time to look into the practice, and now on this day,

HIS LORDSHIP stated that the proper mode of proceeding in this case will be, to draw up the decree that was pronounced during the lifetime of the plaintiff; and a petition should then be prepared stating succinctly the nature of the suit, and of the decree pronounced, which petition may be fiatied for a day sufficiently distant to enable the defendant to apply for the appointment of a guardian *ad litem* to the infants; the defendant becoming as it were plaintiff, as would have been the case under the old practice in a bill filed by him to revive the suit; the petition and fiat must then be served on the guardian *ad litem*, and the suit will be revived if no cause is shewn against it.

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GALBRAITH v. ARMSTRONG.

*Revivor—Taking account after death of defendant.*

In a foreclosure suit an account of principal and interest had been directed to be taken before the decree was drawn up; before this was done the defendant died, and an application was now made by the plaintiff to be at liberty to take the usual account upon the facts stated in the affidavit of the plaintiff. The decree, it was alleged, would bear date prior to the death of the defendant, and as the bill had been taken *pro confesso* against the defendant, the account, in the event of his being still alive, would have been proceeded with behind his back, the orders of 1853 providing that all proceedings after a bill has been taken *pro confesso*, may be taken *ex parte*; but

THE CHANCELLOR—Drawing up a decree, which had been previously pronounced, after the death of one of the parties, is a proceeding that would be clearly regular; but so far as

my recollection of the cases goes, I do not think that any authority will be found warranting us in proceeding to take an account after the death of the party who is bound to pay. The point, however, is one of considerable importance to suitors, and perhaps it would be well to take the opinion of the full court upon it.

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### McDONALD V. DICAIRE.

*Security for costs—Judge bound to take notice of territorial division of Province.*

The bill in this cause stated the plaintiff to be resident *in the parish of Rigaud, in the county of Vaudreuil*, and an application had on a previous day been made by *Taylor* for an order for security for costs; a doubt was suggested whether the court can judicially take notice that Vaudreuil was out of jurisdiction; but now

**THE CHANCELLOR** — Thought that by the provincial statute 16 Victoria, chapter 152, the whole province having been set off into territorial divisions, the court was bound to take notice of such sub-division of the country as that act makes, and that therefore the security for costs should be given.

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### WILLIAMS V. ATKINSON.

*Order giving defendant liberty to answer not acted on—Pro confesso.*

After a decree in a foreclosure suit referring it to the master to take an account of what was due, the defendant applied to set aside the order *pro confesso*, and subsequent proceedings; and permit an answer to be filed, which was ordered to be done upon the defendant paying the costs of the application, and putting in his answer within two weeks, in default the decree already drawn up to remain in force. No action having been taken by the defendant under this order for several weeks, *Blevins*, for the plaintiff, applied upon notice to discharge that order with costs.—[THE CHANCELLOR made the order as asked, although at first doubting any necessity therefor, as the order already drawn up declared that under the circumstances which had occurred, the decree should remain in force.

## PETERBOROUGH v. CONGER.

[March 29.

*Evidence of wife of party to suit.*

*Semble*, that by statute 16 Victoria, chapter 19, the wife of a party to a suit is not *lable* to be called as a witness by a party opposed to her husband, although the husband is, but if she consents to be so examined, no persons affected by her evidence can object.

This was a suit instituted by the Municipality of the town of Peterborough, against Wilson S. Conger, and Eleazer H. Whitmarsh, for the purpose of compelling the defendants, or one of them, to refund the sum of about £1500, alleged to have been retained by Conger, upon the purchase from Whitmarsh of certain Municipal Loan Fund Debentures. Conger swore in his answer, and afterwards upon his examination before the court, that he had paid the whole of the alleged surplus or profit of about £1500 to Whitmarsh; Whitmarsh in the same way, and as positively, swore that he had received about one half of the sum claimed, and no more from Conger in any way. After the evidence had been concluded, and the cause ripe for hearing, an application was made by *Hector* on behalf of the plaintiffs for liberty to examine Mrs. Whitmarsh as a witness in the cause, whose evidence it was sworn had been discovered after the examination had been closed. The evidence which it was stated Mrs. Whitmarsh would be able to give referred to a conversation alleged to have taken place, in her presence, between Conger and her husband; the nature and effect of which is stated in the judgment.

*Doyle*, for Conger, contra.

SPRAGGE, V. C.—The plaintiffs apply for leave to examine the wife of defendant Whitmarsh, in order to give evidence of what passed at an interview between the defendant Conger and her husband and herself, in relation to a transaction as to which her husband and the defendant Conger have upon their examination given conflicting accounts.

The tendency of the evidence proposed to be given by the wife, is to shew that her husband received from the defendant Conger some seven or eight hundred pounds of the moneys

of the plaintiffs, less than Conger states that he paid to him, and for which he took his receipt ; and consequently, assuming that Whitmarsh is a proper party, and liable to the plaintiffs in respect to the moneys received by him (which must be taken to be the case as regards the plaintiffs, who make this application,) the tendency of the wife's evidence would be to relieve her husband from accountability to the plaintiffs to the amount to which I have referred. The plaintiffs say that the effect of the proposed evidence would be to shew collusion between Whitmarsh and the plaintiffs' agent, Conger, and would therefore be against her husband, but if the fact of collusion is established otherwise, the tendency of the proposed evidence would simply be, to relieve Whitmarsh from accountability for so much money. I do not say that any collusion between Whitmarsh and Conger has been proved, but the plaintiffs had closed the case, and set down the cause for hearing, retaining Whitmarsh as well as Conger as defendants, before this application was made.

It was argued before me that it was immaterial whether the proposed evidence of the wife is for or against her husband, but the proviso to the 1st section of 16 Vic., ch. 19, is very different from the 14th and 15th Vic., ch. 66. It is : "That the wife of the party to any suit or proceeding, named in the record, shall not be liable to be examined as a witness by or at the instance of the opposite party." This follows a proviso that parties to the record, and those substantially in that position, or the wife or husband of such party, shall not be called as witnesses on their own behalf ; but that "such party may in any civil proceeding be called and examined as a witness in any suit or action at the instance of the opposite party." Taking the whole clause together, it would seem that a party to a cause is liable to be examined as a witness by an opposite party, but that his wife is not liable to be so examined. It does not follow that if she consent to be so examined, any persons who may be affected by her evidence can object to it.

Here the plaintiffs desire to examine the wife of one of two defendants upon the point to which I have adverted ;

neither the husband nor the wife objects ; the husband communicated to his own solicitor the facts in connexion with the proposed evidence, and the wife has made an affidavit in support of the application. The doubt may be whether this application is not in fact the application of the husband rather than of the plaintiffs ; but it is made by the plaintiffs, through their own solicitor ; and I cannot say that they have not a right, apart from circumstances to which I will advert presently, to use the evidence of the wife of one defendant to fix the other defendant with the retention in his hands of a portion of these moneys, although the effect may have been to relieve the husband of the witness from accountability for the same moneys ; the question in such a case, I apprehend, will be one of credibility, not of competency.

But assuming the wife to be a competent witness, it is another question whether her evidence ought to be admitted now, and I confess that I do not think it would be a sound exercise of discretion to admit the evidence of Mrs. Whitmarsh upon the point proposed, at this stage of the proceedings ; and if the proposed evidence was that of a son, or other person deeply interested in the reputation, and pecuniary means of Mr. Whitmarsh, I think I should be against its admission. If such a witness had been present for examination at the same time as the other witnesses, care would have been taken that the evidence of the one should not be given in the presence of the other, and that no communication should pass between them until the evidence of both had been given. It is now proposed to make the wife a witness, after seeing what evidence had been given by her husband, and what by Conger, and with the most powerful motives that can well be conceived, to give evidence in one particular way. To admit evidence of a particular witness, or as to a particular fact after the general evidence has been closed, is always looked upon as very objectionable, as open to great abuse, and as placing the party against whom the evidence is intended to be used at a great disadvantage ; and these objections, it is obvious, apply with two-fold force to the evidence now offered.

There is yet a further objection to the proposed evidence ;

that it is of alleged admissions, made by Conger, in the course of conversation; a sort of evidence frequently commented upon by judges as extremely unsatisfactory. Both Conger and Whitmarsh, who have each made an affidavit, agree that there was such an interview, and that Whitmarsh and his wife endeavoured to persuade Conger to give up the receipt, but as to the rest they differ, Mr. Conger denying explicitly the truth of the alleged admissions. Considering, then, the nature as well as the source of the proposed evidence, and the time and circumstances under which it is proposed to be given, I think it ought not now to be admitted, and that the application should be refused with costs.

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### DIX v. JARMAN.

[April 6.

*Guardian ad litem.*

The guardian *ad litem* to an infant, has no authority, after the object of the suit has been accomplished, to act for the infant in investing any funds for the infant.

In this suit proceedings had been instituted by a mortgagee against the infant heirs of the mortgagor, for the purpose of foreclosing the mortgage. At the hearing the court ordered the mortgage estate to be sold, which was accordingly done, and realized a sum sufficient to pay the mortgage money, interest and costs, and leave a balance to the credit of the defendants.

*Crickmore*, who had been appointed guardian *ad litem* to the infants, under section 5 of the XIII. of the orders of 1853, moved for an order to invest the sum thus remaining to their credit; but

THE CHANCELLOR.—This was a foreclosure suit, the defendants are infants, and one of the solicitors was appointed guardian *ad litem* at the instance of the plaintiff. The property was sold, and the surplus, after payment of the mortgage debt, was paid into court to the credit of the infants. This is an application by the guardian *ad litem* to have that fund invested. I cannot accede to the application. The

guardian *ad litem* has no authority to make it. He was appointed to protect the interests of the infants in the suit, at the instance of the plaintiff, and to enable him to obtain the relief to which he was entitled. But that having been accomplished, the authority of the guardian *ad litem* has ceased. He was appointed to protect the infants in that suit, but not to deal with their property subsequently. The court has not power to appoint a solicitor guardian for any such purpose. Suppose the infants to apply the day after the investment of the fund to have the money paid to them, or applied to their benefit, what answer could I make to such an application? Would it be a reasonable answer to say that I had allowed the fund to be withdrawn at the instance of a person who had no authority from them—who had not been appointed their guardian—who for the present purpose must be considered a mere stranger? For these reasons I must refuse the application.

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THE GREAT WESTERN RAILWAY COMPANY V. THE  
DESJARDINS CANAL.

[April 6.

*Order to elect.*

A defendant is not entitled to an order calling upon the plaintiff to elect whether he will proceed in this court or at law, until after he has answered the bill; and a demurrer is not such a proceeding as will entitle the defendant to the order.

In this case a demurrer had been filed, and subsequently the defendants obtained, upon preceipe, the usual order for the plaintiffs to elect whether they would proceed in this court or at law, it being alleged that he was proceeding in both courts for the same cause of action.

*D. G. Boulton* now moved for an order to discharge the order to elect which had been so obtained, on the ground that the defendant not having answered the bill he was not entitled to the order he had taken upon preceipe, the well established rule being, that until the defendant has fully answered the bill, he has no right to put the plaintiff to his election—*Fisher v. Mee*, 3 Mer. 45.

*Strong*, contra. Under the practice which formerly

obtained in Chancery, the defendant in answering the plaintiff's bill, was bound to make discovery, and therefore before taking an order to elect, he was bound to have fully answered: by the new orders, however, the defendant is not bound to make any discovery by answer, and therefore the rule referred to does not apply to the present practice. He referred to the anonymous case in *Mosley*, 304, and *Carwick v. Young*, 2 *Swans*, 243.

THE CHANCELLOR.—The order to elect must be discharged. The defendant put in a demurrer to the plaintiff's bill in December last, and on the 24th March, before the demurrer had been argued, and before any answer had been filed, they obtained, as of course, the usual order to elect. Now it is clearly settled, I apprehend, that a defendant has no right to such an order until he has filed a full answer. That was decided by Lord Nottingham, in the Anonymous case referred to in 1 *Ves.* 103, where an order to elect was discharged: "for that it was allowed before the defendant had answered." And the rule is clearly stated by Lord King, in *Jones v. The Earl of Strafford*, 3 *P. W.* 90; when overruling a plea as amounting only to an allegation that there was another action for the same cause in another court, he observes: "that the plaintiff ought to make his election in what court he would sue, *which election no plaintiff is bound to make until the defendant has answered.*" Sir John Leach acted upon these cases in *Brown v. Poyntz*, 3 *Mad.* 24, where we find the rule and the reason of it clearly stated. He says: "The plaintiff is entitled to a complete answer before he can be put to his election, for it may be that until he has a complete answer he cannot decide in which court it will be most advisable he should prosecute his claim." And in *Coupland v. Bradock*, 5 *Mad.* 14, the same learned judge observes: "a party is certainly entitled to a full answer before he can be compelled to elect." *Fisher v. Mee*, cited upon the argument of the motion is a clear authority for the same point. The rule to which I have referred was not questioned in that case. But the defendant having put in a plea and answer, the argument was that he had answered

within the meaning of the bill. But Lord *Eldon* said: "It is impossible to say that a plea and answer is an answer *within the meaning of the rule.*" What rule? Why the rule to which I have already adverted, that a defendant has no right to an order to elect until he has answered. (a) For these reasons I am of opinion that the order in question must be discharged with costs.

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### McDUFFIE v. McDUFFIE.

[April 7.

*Sale of lands in default of payment.*

A decree had been pronounced in favour of the plaintiff, with costs, declaring him entitled to maintenance out of certain lands, and directing him to be paid the amount found due, or in default a sale. In drawing up the decree, costs as between solicitor and client were ordered to be paid to the plaintiff; and default having been made in payment of the amount found due, *Cattenach* for plaintiff now moved for an order absolute to sell the lands in question. THE CHANCELLOR, under the circumstances, refused the application.

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### CRAIG v. CRAIG.

[April 12.

*Alimony.*

This was a suit for alimony. The defendant having signed a consent to an order being made directing him to pay the plaintiff a certain sum for alimony, a motion was now made by *J. B. Davis* for an order in terms of the consent; but, THE CHANCELLOR.—If this order were made as consented to, it would amount in reality to a decree in the cause: the matter must be brought before the full court.

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(a) And see section 20 of the 16th of the English orders of May, 1845.

## MCKECHNIE V. MCKECHNIE.

[April 14.

*Mortgagor—Mortgagee.*

This was a suit for foreclosure and sale brought by the mortgagees residing in Scotland, the defendants then being resident in this country. Since proceedings had been instituted the defendants had removed from the province, two being resident in England, and another in California.

The amount found due had not been paid at the time and place appointed, and *W. Davis* now moved for an absolute order to sell. There was no affidavit of non-payment by the plaintiffs, but the agent in this province negatived the payment.

**THE CHANCELLOR.**—The final order has been granted in some cases where the plaintiffs were resident out of this country, and the mortgagors were within the jurisdiction, upon production of the affidavit of the agent, shewing that the money had not been paid, and that the agent had had the entire management of the transaction; but in this case, the plaintiffs and some of the defendants being both resident in Great Britain, nothing would be more reasonable if the defendants desired to pay, than that they would have done so there. I think an affidavit from the plaintiffs must be produced, but I would suggest that a safer mode of proceeding would be to serve the defendants in England, with a notice of motion for the order now asked.

## CAMERON V. LYNES.

[April 28.

*Foreclosure—Parties.*

A mortgagee filed a bill of foreclosure against the mortgagor alone, and seven months after the final order of foreclosure had been pronounced the mortgagor moved to set the order aside on the ground that several mesne incumbrancers had not been made parties either before decree, or in the Master's office. The application was refused with costs.

On a former day *Fitzgerald* for the defendant, moved upon notice for an order to set aside the final decree of fore-

closure in this cause, under the circumstances stated in the judgment.

*Bennett*, contra.

ESTEN, V. C.—This was an application by the defendant, a mortgagor to set aside a final order of foreclosure pronounced against him, on the ground that there was incumbrancers who had not been made parties to the suit, either before the hearing, or in the master's office. The bill was filed against the mortgagor alone, and it was taken *pro confesso* against him. He did not appear at the hearing, nor did he appear in the master's office, and object any want of parties. The final order of foreclosure was pronounced as long ago as September, 1858, and this application is not made until April, 1859. Under the former practice of the Court, if a bill of foreclosure were filed against a mortgagor alone, and there were mesne encumbrancers, the mortgagor might object to the suit for want of parties, and the plaintiff was obliged to add the mesne encumbrancers as parties to the suit. *Bishop of Winchester v. Beavor*, 3 Ves. 316. Under the present practice a bill of foreclosure may be filed against a mortgagor alone, and the defendant cannot object to the suit for want of parties. At the hearing the mortgagee may take a decree against the mortgagor alone, but I apprehend that the mortgagor, whether the bill has been taken *pro confesso* against him or not, may appear and object that there are other mesne incumbrancers, and in this case I think that the court will direct an enquiry as to mesne incumbrancers. When in the master's office, in like manner the mortgagor may appear and object the want of parties, and in this case I apprehend the master will cause the other incumbrancers to be made parties, and if they desired to avail themselves of their rights, they will apply to vary the decree, if not they will be foreclosed, and in either case the mortgagee will be protected from future litigation. But if the mortgagor does not appear in the master's office and make the objection, then it seems to me, that as the mortgagee might have taken a decree against the mortgagor alone at the hearing, so he may waive the enquiry

in the master's office, and that under such circumstances the mortgagor who has not raised the objection either at the hearing or in the master's office, cannot after the order of final foreclosure has been pronounced apply to the court, in the absence of any special circumstances warranting a departure from the ordinary practice, to discharge it. Nor can this course be attended with any inconvenience either to the incumbrancers or to purchasers. A purchaser from the mortgagee would be obliged to ascertain that all necessary parties had been before the court, and for that purpose to search the registry before completing the purchase, whether an immediate decree were taken at the hearing, or an enquiry were ordered, and in the latter case, whether the enquiry were prosecuted or waived. He would therefore, in such a case know that there were incumbrancers who were not bound by the decree. And these incumbrancers would be safe, because they would not be bound, and might institute a suit for redemption at any time within the period allowed by law. I think, too, that if such an application could be entertained at all, it would be too late after the expiration of seven months from the date of the order of final foreclosure. I think the application should be refused with costs.

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### WILSON v. SWITZER.

[May 2.

*Award—Attachment.*

Where it is necessary to enforce performance of an award, the proper mode of doing so is to serve an order that the party do within a time therein to be limited, perform the award; which order must be endorsed with the notice required by the 46th of the orders of 1853. An attachment issued for non-performance of an award, when no such order had been served, was set aside with costs; although an order making the award an order of the court with such notice endorsed, had been duly served.

This was a motion by *Blevins* to discharge the plaintiff from the custody of the sheriff of the counties of York and Peel, where he was confined upon an attachment for non-performance of an award; the facts are clearly stated in the judgment, which was delivered by

ESTEN, V. C.—In this case an order of reference was

pronounced on the 12th November, 1857, under which an award was duly made. On motion upon notice this award was made an order of court by order dated 3rd December, 1858. Service was effected of this order, and upon non-compliance with its requirements, an attachment issued upon *præcipe*, upon which the plaintiff has been arrested, and is in prison. The object of this application is to discharge this attachment for irregularity, and I think it ought to be granted with costs. When an order of reference is made under the statute, the course to be pursued for compelling obedience to the award is prescribed by the statute itself. When an order of reference is made in a suit, as this is, the award may be enforced according to the general practice of the court. The course is to obtain an order upon notice, that the party do perform the award, which notice must specify the acts to be performed. The order should limit a certain time after service, within which the required acts are to be performed, and on non-compliance, may be enforced in the same way as any other order of the court. In this case the award was made an order of court, which appears to be unnecessary, (Russell on awards, 555;) but no order was made that the party should perform the award, and one question may be, whether, an order making an award an order of court is equivalent to an order that the party do perform the award. I think it is not. The two orders are different things; the respective notices are not, or need not be the same; and a party whose liberty is to be affected has a right to claim a strict compliance with the practice, in order that he may know exactly the position in which he stands. But supposing the order making the award an order of court equivalent to an order that the party do perform the award, did the order in question sufficiently comply with the requirements of the 46th of the general orders of this court, which directs that every order shall limit a time after service for the performance of the acts commanded to be done. This order limits no time after service. As to Brocker it limits no time at all, and as to S. Wilson the only limitation is the one contained in the award. For these reasons I think this attachment was irregular, and ought to be discharged with costs.

## THOMAS V. TORRANCE.

[June 7.

*Production of deed—Amendment Multifariousness.*

To a bill filed by one co-partner against another seeking to set aside a marriage settlement as having been made by the settler at a time when he was insolvent, the trustees and *cestuis que* trust of the settlement, are necessary parties, as they are entitled to have the accounts of the partnership taken, and assets thereof applied in exoneration of the settled lands.

This was a suit by one Thomas, against Henry Torrance, alleging the insolvency of the co-partnership which had existed between the parties, and seeking to set aside the deed of settlement made by Torrance after the formation of the partnership, and at a time when the defendant, it was alleged, was insolvent. A motion had on a previous occasion been made to compel the production of this instrument, but that was opposed, and successfully, on the ground that to any suit to impeach this deed the trustees, and also the *cestuis que* trust should be parties. A motion was afterwards made by *McGregor* on behalf of the plaintiff for an order to amend by making those parties defendants to the cause. *Cattanach*, contra, objected that if the bill were amended in the manner proposed, it would be rendered open to demurrer for multifariousness, referring to *Salvidge v. Hyde*, Jac. 151.

ESTEN, V. C.—I have read the papers, and consulted the case of *Salvage v. Hyde*, cited by Mr. *Cattanach*, and I think this application should be granted on proper terms. I do not think that the bill will be rendered multifarious by the proposed amendment. The parties interested under the settlement have an interest in the accounts of the partnership, and a right to have them taken. Supposing the settlement a fraud upon creditors, it is binding upon Mr. Torrance, and in any suit that might be instituted to set it aside the parties interested under it would have a right to have all the accounts of the partnership taken, and the assets realised and applied to the satisfaction of the debts in order to exonerate the settled lands. I therefore think that these parties cannot object to the bill as multifarious, if amended as proposed. There is another point which was not taken in

argument: the objection to the settlement is that it is a fraud upon creditors. Is Mr. Thomas a creditor entitled to make this objection, and is he in a position to do so? In general a creditor cannot impeach a settlement until he has obtained judgment for his debt. In the present case Mr. Thomas cannot anticipate that the assets will be insufficient to satisfy the debts; that the partners will be ordered to pay the deficiency; that he will be obliged to pay more than his share, and will be hindered from recovering it from Mr. Torrance by this settlement. I think, however improbable such a case may appear, if it really occurs, Mr. Thomas would be a creditor enabled to impeach the settlement, and as if he were compelled to wait until he should be in the situation I have described, property might be placed beyond his reach, I think he might be considered to be in a position to make the objection. The form of the settlement is now under judicial consideration, and probably a power of sale may be introduced into it, under which the property may be alienated, under such circumstances as to defeat the plaintiff's remedy. It may be, and indeed has been, urged that the case intended to be presented by this amendment is highly improbable, that this is an antenuptial settlement, founded therefore on valuable consideration, and that to impeach it successfully it must be shewn that the wife or the trustees participated in the fraud imputed to Mr. Torrance. This is an argument of great weight, but at the same time I should not like to take upon myself the responsibility of excluding this amendment, especially in a case where the plaintiff has by his own voluntary act brought the suit to a hearing on motion for decree, thereby evincing a desire to expedite its decision, and had he taken the ordinary course the cause could not have been heard before the time at which it may be heard now. Upon the whole, I think that the application should be granted upon the terms of paying the costs of this application, and of the motion for decree so far as it has gone.

## MANLEY v. WILLIAMS.

[June 15.

*Security for costs.*

Where a suit is brought in this court to restrain proceedings at law, the plaintiff will not be ordered to give security for costs, though resident out of the jurisdiction; and that, too, notwithstanding the bill may ask for relief other than the injunction.

This was an application by *Blevins* for an order for security for costs, on the ground that the plaintiff was resident out of the jurisdiction. *G. D. Boulton* contra, cited *Vincent v. Hunter*, 5 Hare, 32; *Watteeu v. Billam*, 3 DeG. & S. 516, to shew that where, as in this case, the bill is filed to restrain proceedings at law, the plaintiff, although resident abroad, will not be required to give security for costs, and the fact that the bill prays other relief besides the injunction, will not entitle the defendant to this order.

ESTEN, V. C.—This being a suit to restrain proceedings at law, the plaintiff cannot be required to give security for costs.

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## WHITE v. WHITE.

June 20.

*Security for costs.*

The recent act (22 Vic. ch. 33), has effected a material change in the practice of this court as to granting or refusing security for costs. The fact that the plaintiff has not any fixed place of abode within the province will not be sufficient to warrant an order for that purpose where it is shewn that he has property within the jurisdiction.

This was an application by *S. Blake*, for an order requiring the plaintiff to give security for costs on the grounds stated in the judgment of

ESTEN, V. C.—This is an application for security for costs, on the ground that the plaintiff has no fixed place of abode. It appears from the affidavits that the plaintiff is the mate of a vessel navigating lakes Erie and Ontario between American and Canadian ports during the season of navigation; and

that during the winter months he resides on a farm belonging to him within this province. I think the application ought to be refused with costs.

I consider the law or practice on this point a good deal affected by the late alterations in the law. Hitherto it has been a matter of great importance to a defendant that the plaintiff should have a fixed place of abode within the jurisdiction. This was the case both at law and in equity; at law, because originally the body could be taken in execution if all other means failed; in equity, because the first step, and an indispensable one, was the personal service of a subpoena for costs, followed by an attachment, attachment with proclamations, commission of rebellion and sequestration. Latterly in this province, personal service of the decree or order has been substituted for service of the subpoena for costs.

It is obvious that under these circumstances, when the plaintiff was resident out of the jurisdiction or had no fixed place of abode within it, the defendant, if the bill was dismissed with costs, or costs were ordered to be paid to him in the course of the cause, was without remedy, because personal service of the subpoena or decree was essentially necessary. But this is all changed by the new law. No man is now liable in his person for costs; no personal service is necessary for the recovery of costs. The moment a decree or order is made for the payment of costs; the party entitled can issue his *fieri facias*, and writ of sequestration and enforce his registered decree wherever the party liable may be, provided he has property; and if he has no property he is without remedy, whether he is within the jurisdiction or not. The true ground for granting security for costs now should be, not that the plaintiff has no fixed place of abode within the jurisdiction; but that he has no property. Should an application be allowed on this ground? I think not. The consequence would be that every suit would be commenced with an expensive litigation—a certain evil for an uncertain good. I would still entertain applications for security for costs in cases where the plaintiff has no fixed place of abode within the juris-

diction; when that fact is attended with circumstances raising a presumption that he has no property, or not sufficient property for the payment of his debts. In the present case no such presumption arises. The plaintiff is permanently resident during the winter months, and only removes from place to place at other times, in the pursuit of an honest occupation, which is incompatible indeed with a permanent residence in any particular place, but is perfectly consistent with the possession of property.

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### CAMPBELL V. FERRIS.

#### *Discharging order for dismissed bill.*

After an order dismissing a bill for want of prosecution had been obtained upon notice, the plaintiff applied to discharge that order, alleging his intention of prosecuting the suit, and that he had not received any personal notice of the motion to dismiss. The application was granted upon payment of costs, and the terms of paying into court certain instalments claimed to be due the defendant.

In this case an order to dismiss for want of prosecution had been obtained upon notice. Afterwards *C. Crickmore*, for the plaintiff, applied to discharge that order on the grounds appearing in the judgment.

*Roaf*, contra.

ESTEN, V. C.—I think it right to grant this application, although with reluctance. It would have been more satisfactory had the plaintiff's solicitor made an affidavit himself of the fact of his having written to his client, and of the purport of the letter. But the fact of his having written is supplied by the affidavit of Mr. Martin, produced with no intention, certainly, of assisting the application, and I must assume that the tenor of the letter was suitable to the occasion. Had this letter been received, it might have led to proceedings which would have prevented the dismissal of the bill. It is true that Mr. Martin says, that he shortly after the writing of the letter saw the plaintiff and told him of it, and added, that he must do something, otherwise his bill would be dismissed. It is impossible, however, to say what Mr. Martin means by shortly after, and this informa-

tion may have led to the discovery of the letter. I must believe the plaintiff when he states that he did not receive the letter till the 18th of February, and the order of dismissal was pronounced nine days afterwards. As to what Mr. Martin said to the plaintiff about the dismissal of the bill, as a general rule, I pay no attention to what is said by the solicitor of one party to the other party ; any communication relative to the suit should be addressed to the solicitor, and not to the client. I think, therefore, that the application should be granted on the payment of costs, and of the costs of the order of dismissal ; and on the plaintiff undertaking to speed the cause, an undertaking to bring it to a hearing on motion for decree, would not be improper under the circumstances, if the defendant should desire it. I apprehend that the facts are not much in dispute. I may add that I have an unfavourable impression, in my imperfect knowledge of the facts of the case, of the plaintiff's conduct, and that I do not think it will be the duty of the court to restrain the proceedings of the action of ejectment, which by this time has probably been tried, except upon the terms of paying the over-due instalments into court ; and that if the plaintiff is unable to do this, it will be for him to consider whether it is desirable for him to prosecute the suit. My impression is, that the plaintiff failed to complete the payment of the first instalment at the proper time, and that this default probably caused the defendant to abscond, and that since the plaintiff obtained possession of the property he has not used it at all, and has indeed entertained the intention of abandoning it, and departing the province. The plaintiff knows best if these facts are true or not. I do not say they will be sufficient to prevent him from obtaining relief at the hearing of the cause, and express no opinion on the point ; but I do not think it will be possible to protect his possession, except upon the terms of paying the over-due instalments and interest into court.

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## IN RE YAGGIE.

*Purchaser getting rid of contract.*

A party contracted to purchase lands of persons not capable of selling without the authority of this court, which was subsequently obtained. The purchaser having in the meantime gone into possession of, and improved the property, afterwards applied to be relieved from the purchase, and to have the improvements paid for out of the estate, alleging his inability to carry out the bargain. The application was granted in so far as he sought to be relieved from the purchase; and declared him entitled to be treated as the purchaser of the widow's dower, but refused to make him any allowance in consideration of his improvements, or return him the money he had paid.

This was an application by *Fitzgerald* to discharge a purchaser who had entered into a contract for the purchase of the infants' estate, with their mother, alleging his inability to carry out the purchase.

*W. Davis, contra.*

ESTEN, V. C.—I think, under the circumstances of the case, the purchaser, John Otto, is bound by the sale made under the sanction of the court, of the property in question. I cannot distinguish this case from the case of *Huggard v. Scott*, 1 R. & M. 293, cited in the argument. In that case, as in this, the contract was made with persons having no authority to make it; the estate in neither case was bound until the intervention of the court was effectually obtained; in both, the purchasers consented that the sale should be perfected in that way. Mr. *Fitzgerald* attempted to distinguish the present from the cited case, but I think failed. He argued that when the conveyance in the cited case was ordered from the infant trustee to the new trustees, the plaintiffs in the suit, the title was complete; whereas, in the present case, the title depended upon the sale, sanctioned by the court, which required the consent of the purchaser. But the consent of the purchaser was given, and whether it was before or after the sanction of the court was obtained, must be immaterial. I of course lay the order that was made, so far as it proceeded on the consent of the purchaser, out of the case, and regard the case in the same light as if the order had been made in his absence, or against his will. It is said that great delay occurred in prosecuting the proceedings in the

infancy. It is true that great delay did occur, and it is possible, and even probable that had the purchaser applied on that ground to be discharged from his purchase, the application would have been granted. But he takes no such step, and indeed no step whatever, but remains in possession until the time of pronouncing the order, and indeed until the present time; and appears to have continued his improvements until a late period. The property has probably also declined in value; a circumstance which would have added strength to his application, had he made it to be relieved from his purchase. I think, therefore, he is bound by the purchase, and can only be relieved from it on the terms of forfeiting his improvements, and the money; he has paid, so far as they have gone to the infants. Upon the affidavits, I think it right to relieve him from his purchase on those terms. But I think he is entitled to be regarded as the purchaser of the wife's dower, as it must be the same thing to the infants whether the dower is in him or the widow.

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## IN RE TAYLOR AND BOSTWICK.

[August 25.

*Arbitration.*

It would seem that a motion to set aside an award in this court, must be made within the common law term following the publication of the award.

This was an application by *Barrett* to make an award a rule of this court. It appeared that in pursuance of the terms of a lease a submission had been made to arbitrators to determine the rent at which a renewal of such lease should be given; and that, under that submission, the arbitrators had published the award now sought to be enforced. *English*, in opposing the application, filed affidavits shewing that by reason of the widening of a lane by authority of the city council, some feet had been taken off the depth of the leased property, and that it was believed the arbitrators, at the time of making and publishing their award, were not aware of that circumstance, and that if the fact had been

brought to their knowledge they would have ordered a renewal of the lease at a much lower rent than had been fixed upon.

ESTEN, V. C.—The whole question seems to turn upon the arbitrators being or not aware of the diminution in the depth of the land. If they were aware of this fact, no objection can be made to the award; but if they were ignorant of the fact, it would probably have been a good reason for setting aside the award, had complaint been made in due time, that is, within the common law term following the publication of the award; which I think is the proper time, although the question is now *sub judice* before the full court, and it is possible that they may arrive at a different conclusion. Supposing the arbitrators to have been ignorant of this fact, and that the parties complaining of the award could not with reasonable diligence have discovered such ignorance in time to complain of the award; the question arises whether the court would enlarge the time for that purpose, and I think it would not. Smith & Blake in re, 3 Dow, 133; Evans & Howell in re, 4 M. & G. 767; Midland Railway Company v. Henning, 11 Jur. 658; Harvey v. Shelton, 7 Beav. 455. And under such circumstances I think the court should not refuse to enforce the award, the ground of complaint not being apparent on the face of it. If my view on the law of the case had been different, I would have directed further enquiry, for the purpose of ascertaining whether the arbitrators were or not ignorant of the diminution in the depth of the ground when they made their award. I think the application should be granted with costs, the lease to be settled by a judge, in case the parties differ.

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#### RE HEELY.

##### *Purchase under decree—Re-sale.*

Where a purchaser under a decree of the court, makes default in completing the purchase, the court, if it see fit, will order the property to be re-sold and the purchaser to make good any deficiency that may arise upon such re-sale; but if the purchaser becomes insolvent, and unable to complete the purchase, he will be discharged from it.

In this matter an order had been made under the statute

12 Victoria, chapter 72, for the sale by auction of certain of real estate belonging to these infants ; and at the sale one Benjamin Shaw became the purchaser of a portion of the property, and paid the deposit stipulated for by the conditions of sale. The vendor's solicitor prepared the conveyance and mortgage for the purpose of completing the sale. The solicitor, however, insisted upon the purchaser removing certain judgments from the registry, before he would consent to carry out the contract, which Shaw being unable to do, a motion was now made by W. Davis, on behalf of the vendors, for an order rescinding the sale made to Shaw, directing a re-sale, and that Shaw might be ordered to make good any deficiency.—Citing *Hodder v. Ruffin*, 1 Ves. & B. 544; *Harding v. Harding*, 4 M. & C. 514.

ESTEN, V. C.—The cases of *Hodder v. Ruffin*, and *Harding v. Harding*, shew clearly that if a purchaser under decree make default, the property will be ordered to be re-sold, and the purchaser held liable for any deficiency ; and also, that if a purchaser become insolvent and unable to complete his purchase, he may be discharged from it. In the present case there is quite enough on Mr. Shaw's own affidavit to discharge him from his purchase ; but I am not satisfied that he has been guilty of such default as should make him liable to the strict order which is asked. He paid the deposit, and for aught that appears, may have paid all the interest that has accrued due ; he should indeed have caused a conveyance to be prepared, and tendered it for execution ; but the vendors themselves had the conveyance and mortgage prepared, and forwarded them for execution ; that Shaw perused but did not execute them ; and that he was afterwards informed that it would be useless for him to execute the mortgage unless he could remove the judgments that stood against his property ; which seems founded on a mistaken view of the law. Upon the present evidence I can make no other order than to discharge Mr. Shaw from his purchase. The expediency of a re-sale at the present moment seems questionable ; but that it is a matter that had better be submitted to the consideration of my brother Spragge, before whom this matter has hitherto been conducted.

## MITCHELL V. HAYES.

[August 27.

*Foreclosure absolute—Attending to receive mortgage money.*

This was an application on a former day, for the final decree of foreclosure, default having been made in payment of the amount found due. The affidavits shewed that the agent of the plaintiff had attended for fifteen minutes of the two hours appointed for payment.

ESTEN, V. C.—Doubted, when the motion was made, if the attendance had been sufficient to entitle the plaintiff to the final order; but after taking time to look into the authorities, he, this day, ordered the decree, as asked, to go.

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## MC LAUGHLAN V. WHITESIDES.

*Motion for decree.*

A plaintiff after giving notice of motion for a decree, cannot abandon such proceeding, and set the cause down for hearing in the usual way. If he desires to do so, he must apply to the court for leave.

In this case a notice of motion for decree had been given to the defendant, who thereupon filed his affidavits in answer to those filed by the plaintiff, who subsequently countermanded such notice, filed a replication, and set the cause down for examination of witnesses, at the September sittings. A motion was thereupon made to take replication off the files, and strike the case out of the paper of causes.

*Mowat, Q. C.*, for the application.

*Fitzgerald, contra.*

ESTEN, V. C.—I think it was irregular to file the replication and set down the cause for examination after having served a notice of motion for decree, and the replication must be ordered to be taken off the file and the cause struck out of the paper, with costs. When a plaintiff has served a

notice of motion for decree, it is competent to him to apply to the court to be permitted to abandon it, and to proceed in the ordinary way, and the court will exercise its discretion in permitting, or not permitting it, and as to the terms upon which it should be permitted. But a plaintiff cannot voluntarily abandon such a motion.

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### BANK OF MONTREAL V. HATCH.

[August 31.

*Absent defendants.*

Section 8th of the IX. of the General Orders of June, 1853, does not apply to any cases other than those for foreclosure or specific performance of an agreement.

This was a motion by *Barrett*, to advertise the defendant under section 8 of Order IX. The suit was by a judgment creditor against his debtor, seeking to enforce the debt. It was suggested by *Barrett* that a doubt existed whether the order under which he applied, extended to the present case. After taking time to look into the point, the application was refused, the order not applying to any case other than for foreclosure or specific performance ; and the affidavit upon which the application was founded, did not shew that defendant had absconded so as to enable the plaintiff to proceed under section 7, of the same order.—SPRAGGE, V. C.

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### CRAWFORD V. COOKE.

*Substitution service of attorney-at-law.*

The rule allowing substitutional service of a bill upon an attorney-at-law, applies only to cases where the object of the suit is to restrain proceedings, at law, not where any other relief is sought.

In this case a bill was filed to restrain proceedings in an action at law, brought upon certain promissory notes held by the defendants, who were resident out of the jurisdiction, on the ground that they had agreed to accept a composition of ten shillings in the pound, in payment of such notes; and seeking also to enforce the specific performance of such

agreement. Application was now made for an order permitting substitutional service of the bill to be effected on the attorney in the action.

SPRAGGE, V. C.—The practice, as I understand it, is to permit service of the bill to be made on the attorney, when the object of the suit is simply to restrain proceedings at law, but here something more is sought by this bill ; the prayer is not only to restrain the action brought upon these notes, but also to enforce the agreement stated in the bill, which if proved, would shew the holders have no right to enforce payment of the notes in full. Notice of motion for an injunction to restrain proceedings may be served upon the attorney.

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WHAN v. LUCAS.

MURNEY v. PRINGLE.

— v. COURTNEY.

[September 2.

It is not proper to make a person entitled to a part of the equity of redemption in a mortgage estate, a party in the master's office, but should be made a defendant by the bill. In these cases the usual reference to the master to enquire as to encumbrances, take account of mortgage debt, and settle priorities, had been made, and in proceeding under the decree, the master, before whom the enquiries were had, directed a person who had purchased a portion of the mortgage premises to be made a party in his office. On a former day application was made for a final order in default of any payment ; but now

ESTEN, V. C.—I think the final order cannot be granted against the mortgagor, unless the purchaser of part of the property made a party for the first time in the master's office be got rid of in some way either by waiver, release, or disclaimer.

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## MOORE v. SHINNERS.

If the wife of the mortgagor joins in the execution of the incumbrance, and a sale of the mortgaged estate is afterwards effected under a decree of the court made in a cause instituted upon such mortgage, it is not necessary for her to join in the conveyance to the purchaser.

In this cause a sale had been ordered for default in payment of the amount found due the mortgagee, and on settling the conveyance before the judge in chambers,

*Fitzgerald*, for the purchaser, insisted upon the wife of the mortgagor joining in, and executing the conveyance for the purpose of barring her right to dower in the equity of redemption.

*Crickmore*, contra, said the wife was not a proper or necessary party to the conveyance, as a widow is entitled to dower only out of equitable estates of which the husband died seised, and here the defendant's right to any interest has been really foreclosed, although the form of decree made is for sale.

THE CHANCELLOR.—The mortgage deed in this case was duly executed by the wife of the mortgagor, who is not a party to the suit. But the purchaser under the decree, which was for sale, insists that she is a necessary party to the conveyance.

It seems clear to me that she is not a necessary party. If the decree had been for foreclosure there cannot be a doubt that the plaintiff would have acquired a perfectly good title; and in that view the order for sale is as effectual as the final order of foreclosure. The order for sale is in effect, if not in form, a foreclosure.

## RUMBLE V. MOORE.

*Amendment—Supplemental matter.*

After a decree had been pronounced in a suit of foreclosure, the plaintiff discovered that portions of the mortgaged premises had been sold by the mortgagor before bill filed. *Held*, in accordance with decisions by Esten, V. C., per Blake, C., that the purchasers of such portions might be brought before the court by amendment, and that the proper mode of proceeding was by petition, although but for those decisions he would have thought a motion for that purpose the proper proceeding.

This was an application by *C. Crickmore*, upon petition,

for an order to amend after decree for the purpose of making purchasers of portions of the mortgage premises parties to the decree, instead of filing a supplemental bill, as would have been required previously to the orders of 1853.

**THE CHANCELLOR.**—After the usual decree of foreclosure had been pronounced in this case it was discovered that the mortgagor had sold several portions of the estate before bill filed, and this is a petition in the nature of a supplemental bill, for the purpose of bringing the purchasers before the court, and obtaining the usual decree against them.

I would have thought a motion to amend under the 14th section of the IX. order, the proper course. But my brother ESTEN, having proceeded upon petition in several cases which have been cited, (Smith v. Wilkes, 29th August, 1859; Digby v. Wilkes, 29th of August, 1859,) and having pointed out that as the proper course in the present case, I shall make the order as prayed.

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Whereas the above named plaintiff did, on the 7th day of September instant, prefer his petition unto this Court, setting forth that since the decree in this cause, and since the said decree was carried into the Master's office, but no proceedings had thereon, it has been discovered that a certain portion of the mortgaged premises in the pleadings mentioned, had been conveyed to one George J. Lynd, and that a certain other portion of the said mortgage premises had also been conveyed to one Charles Hardy, and praying that the said George J. Lynd and Charles Hardy might be made parties to this suit, and might be bound by the decree in this suit, and that the plaintiff's bill might be dismissed as against the said defendant Edward Moore; whereupon it was ordered that all parties interested should this day attend this Court on the matter of that said petition, and no one attending to oppose the same, although duly served with the said petition and fiat thereon, as by affidavits and admissions of service appears; whereupon, and upon hearing read the said petition, and the affidavits filed, and upon hearing what was alleged on behalf of the said plaintiff; it is ordered that the said George J. Lynd and Charles Hardy be made parties defendants to this suit, and be bound by the decree and all future proceedings therein, as if they had been originally made parties defendants hereto.

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#### GREENSHIELDS v. BLACKWOOD.

After the day appointed for payment of the amount due in a suit to foreclose a mortgage security, the plaintiff entered into possession of the mortgage premises. *Held*, that the plaintiff was entitled to a final decree of foreclosure without a new account being taken.

This was a foreclosure suit. A motion had been made on

a former day by *Blake*, for a final order of foreclosure, default having been made in payment of the amount found due. Upon the affidavits it appeared that after the day named for payment of the amount found due, the plaintiff had taken possession of the mortgage premises, and a question arose, whether, under these circumstances, a fresh account must not be taken. *Constable v. Howick*, 5 Jur. N. S. 331, was cited to shew that a mortgagee is entitled to a final foreclosure, notwithstanding the account has been varied after the time appointed for payment; and now

**THE CHANCELLOR.**—The plaintiff having taken possession of the mortgaged premises after the day fixed for payment the question is, can he have the final order of foreclosure without a further reference.

My impression has always been, that a mortgagee who has varied the account between the date of the master's report and the application for a final foreclosure could not proceed without a further reference, and I was not aware until now that any doubt existed as to the practice.

Mr. *Blake* argues, however, on the authority of *Constable v. Howick*, (5 Jur. N. S. 331,) recently decided by Vice-Chancellor Wood, that the variation of the account after the day fixed for payment, is immaterial. That argument assumes that the final order of foreclosure is based upon the simple fact that the mortgage money has not been paid at the time appointed. But that assumption seems to me, I must confess, to be inconsistent with reason and authority. When a mortgagee has received a part of his debt after the time fixed for payment, the fair and reasonable intendment appears to me to be, that the default has been waived, and that a further account and a new day of payment is consequently necessary. And the forms in common use seem to me to carry out that principle, because the mortgagee has always been required to swear that nothing has been paid on principal or interest, and that the whole debt is still due, which would not have been the case, I apprehend, had non-payment at the day appointed been sufficient.

There are several cases which shew that when any thing

has been paid on account of the debt before the day fixed by the master's report, the mortgagee cannot obtain the final order until a further account has been taken and a new day appointed.—Buchanan v. Greenway (12 Beav. 355, and the cases there cited.) The same consequence appears to me to follow when the payment is subsequent, and in Alden v. Foster (5 Beav. 592,) the argument of Mr. Bacon would seem to shew that the point was expressly decided, but that may be doubted.

If Constable v. Howick is to be considered, therefore, as deciding that the final order may be obtained without a further reference where payments have been made subsequent to the day fixed by the master's report, I am not prepared to follow it. But it will be found, I think, that the case does not go that length, although it must be admitted to be inconsistent with Alden v. Foster.

But it is not necessary on the present occasion to determine any thing contrary to the decision of Vice-Chancellor Wood, in Constable v. Howick, because the plaintiff has neither been paid any sum on account of his debt, nor has he received any part of the rents of the mortgage estate. He took possession of the property after the day fixed for payment. But there is nothing in that act which can fairly be considered a waiver of the default, neither did it, strictly speaking, vary the account; and I think I may decide without contravening any previous authority or settled principle, that the court is not bound to direct a further enquiry under such circumstances, if bound to do so at all, except at the special instance of the mortgagor, or those claiming under him. I am of opinion therefore that the plaintiff is entitled to the usual order.

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#### GOODFELLOW V. HAMBLY.

*Order pro confesso against an absconding defendant.*

THE CHANCELLOR, on a motion for an order to take the bill *pro confesso* in this case against the defendant Hambly, under the orders of 1853, authorising notice to be given in some public paper where the defendant has absconded, stated that in future, on all such orders being applied for, the

several newspapers in which the advertisement has been inserted, must be produced and shown to the judge, to whom the application is made, before the order *pro confesso* will be granted.

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## SERGEANT V. SHARPE.

[October, 21.

*Separate answer of married woman.*

Service of an office copy bill had been accepted by a solicitor on behalf of the defendant Sharpe and his wife, and a written consent was given by such solicitor, that in the event of no answer being filed, the bill might be taken *pro confesso*. *Held*, that this did not dispense with an order for the wife to answer separately, and apart from her husband, before proceeding to take the bill *pro confesso*.

This was a foreclosure suit. At the hearing the usual decree had been made in favour of the plaintiff, directing an account of what was due, &c. On proceeding to draw up the decree, it was discovered that there was no order for the defendant Mrs. Sharpe, to answer separately from her husband, in consequence of which, the registrar refused to sign the decree; and now *Norman*, for the plaintiff, moved for an order directing that officer to issue the decree in the form pronounced at the hearing. The order *pro confesso* had been moved for, and granted, by the judge in chambers, upon the written undertaking, and consent of the solicitor for the defendants, whereby he undertook to put in an answer for the defendants; or in default, consented that the bill might be taken *pro confesso*: under these circumstances, he submitted it had not been necessary to obtain an order for the wife to answer separately; but,

ESTEN, V. C.—The solicitor for the defendant is in reality the solicitor for the husband, and the wife being the party whose estate was mortgaged, and in respect of which she was made a party to this cause, no opportunity has been afforded her of putting in her defence to the suit. The order *pro confesso* which has been granted, and which I find was made by myself, was made unadvisedly, and no decree under such circumstances can properly be made binding upon the interest of Mrs. Sharpe. The usual order for her to answer separately from her husband must be taken out and served.

## THE COMMERCIAL BANK V. THE BANK OF UPPER CANADA.

[October, 22.

*Mortgage—Power of sale—Injunction.*

Pending an appeal from this court an injunction was granted restraining a mortgagee from proceeding to a sale of the mortgage premises under a power of sale contained in the deed.

This was a suit instituted to set aside a mortgage security held by the Bank of Upper Canada, on the grounds set forth in the judgment, as reported in the VII. Volume of Mr. Grant's Chancery Reports, page 250. From that judgment an appeal had been made to the Court of Error and Appeal, pending which the defendants gave notice under the power of sale contained in their mortgage, of their intention to proceed to a sale of the mortgage premises; and now *Roaf* for the plaintiffs, moved *ex parte*, for an injunction to restrain the intended sale during the pendency of the appeal, citing as an authority for the application, *Cotton v. Corby*, as reported in the VI. Volume of Mr. Grant's Chancery Reports.

ESTEN, V. C.—Granted the application, but gave the defendants liberty to move at any time to dissolve the injunction.

[On the 8th of November a motion was made by *McDonald* in court to dissolve the injunction, or to vary the order which had been made by directing that the amount claimed to be due under the defendants' mortgage should be paid into court. *Roaf*, for the plaintiffs, agreed that the order might be varied in the manner proposed, which was directed accordingly, and that the amount so paid in should be applied to pay off the defendants' mortgage, in the event of the Court of Appeal sustaining the decree pronounced by the Court of Chancery, and that upon such payment the defendants should assign to the plaintiffs the security held by the defendants.]

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## DALLAS V. GOW.

[November 2.

## Foreclosure—Costs.

Where it is shewn that a mortgagee has for the *bonâ fide* purpose of preserving the mortgage premises from destruction or delapidation, instituted proceedings at law to obtain possession of the property, he will not be deprived of his costs in equity.

This was a foreclosure suit. At the hearing, the usual decree had been pronounced. On a previous day, *McCarthy*, for the defendant, on affidavits showing that the plaintiff had taken proceedings in ejectment under his mortgage, had applied for an order to vary the decree, by refusing to the plaintiff his costs of this suit under the orders of February, 1858. *Cattenach contra*, read an affidavit of plaintiff's agent, showing that in consequence of the defendant having been committing waste and destruction on the property, he, the agent, had, in the belief that such proceeding was necessary, and for the purpose *bonâ fide* of preserving the property, directed the action of ejectment to be brought, and that the same had not been instituted for the purpose of harassing the defendant, or from any vexatious motive whatever.

SPRAGGE, V. C.—Thought the reason assigned for bringing the action was sufficient to entitle the plaintiff to an order giving him his costs in this court, and refused the application, with costs.

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## THE BANK OF BRITISH NORTH AMERICA v. RATTENBURY.

[November 5.

The local agents of the Bank of British North America have not authority to grant powers of attorney to third parties, to receive money ordered to be paid to the bank by a decree of the court.

In this suit a decree had been made directing an account to be taken of what was due the plaintiffs on foot of a judgment recovered against the defendant Rattenbury, which he was ordered to pay in one month after the master's report, or in default, a sale of the defendant's lands affected by the judgment. In pursuance of this decree an account as directed had been taken, and the agent of the bank at London had

given a power of attorney to a third person to attend and receive the amount reported due at the time and place mentioned in the master's report, when default was made by the defendant in making such payment; and an application was now made by *S. Blake* for an absolute order to sell, and that the plaintiffs might have a reserved bidding.

SPRAGGE, V. C.—Thought the act did not authorise the agent to make a power of attorney in favour of another person; that the safer mode of proceeding in such cases would be to have the money made payable at the Bank, when the agent could attend in person to receive the amount found due; but if desired, the point might be brought before the full court.

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[Subsequently an order was moved for, and granted, appointing a new day for payment of the amount found due, which was directed to be paid, as suggested by His Honour.]

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### WHITE v. COURTNEY.

[November, 10.

*Foreclosure absolute—Service of warrants.*

In proceeding under a reference before the master, one of the defendants, after being served with the first warrant, absconded from the jurisdiction, and the subsequent proceedings in the master's office were left at his former place of abode. The court, under the circumstances, made the decree for foreclosure absolute for default of payment.

On a previous day *Barrett* moved for an absolute decree of foreclosure, on default in payment at the time fixed by the master's report. It appeared that one of the defendants, *Jones*, after having been served with the first of the master's warrants to proceed with the reference, had absconded, and the future warrants had been left at his place of residence while within the jurisdiction. After taking time to look into the practice, and advise with the other judges,

SPRAGGE, V. C., before whom the motion was made, said, that under the circumstances, it was thought the order asked for ought to be granted.

## WALLACE V. MCKAY.

*Publication—Setting down cause for examination of witnesses.*

When a cause is set down for the examination of witnesses, publication passes at the end of the ensuing examination term, although issue may have been joined less than three weeks before the commencement of that term.

Where a plaintiff sets down a cause for the examination of witnesses, and serves notice thereof on the other side, but fails to proceed with the examination, this will not entitle defendant to costs of the day: his proper course is to examine his own witnesses, as thereby the plaintiff would be excluded from going into evidence unless by leave of the court

This was an application before his lordship the Chancellor, in Chambers, by *Barrett*, on behalf of the defendants, for an order that plaintiff might be directed to pay the costs of the day for not proceeding with the examination of witnesses pursuant to notice given to defendant. *Blain*, contra.

**THE CHANCELLOR.**—This cause was set down for the examination of witnesses by the plaintiff, during the last examination term, at Hamilton. The defendant attended with his witnesses, but no one attended on behalf of the plaintiff, and after some delay the cause was struck out by the learned judge who presided. Mr. *Barrett* now moves on behalf of the defendant, for the costs of the day, and Mr. *Blain* does not object.

The view of the order \* taken by both parties, is, that as the replication was filed *within three weeks* from the commencement of the last term, publication will not pass until the close of the next term; and Mr. *Barrett* considering that the plaintiff would be at liberty to examine his witnesses during next term, did not wish to open his case until the plaintiff had examined his witnesses, and, in consequence, he moves for the costs of an attendance rendered fruitless by the plaintiff's default; and this course is said to have been pursued in other cases.

This motion is founded upon an entire misapprehension of the effect of the Order in question. The 5th section does provide, no doubt, that "Where issue has been joined in a cause three weeks before the commencement of the next ensuing examination term, at the place where the venue has

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\* Order II., of the 23rd of December, 1857, sec. 5.

been laid, publication is to pass at the close of the next term ; and when issue has been joined less than three weeks before the commencement of the next ensuing examination term, at the place where the venue has been laid, publication is to pass at the close of the following term.” And if there was nothing further in the Order, the view taken of the practice would have been, of course, correct. But it is quite obvious that the section in question only provides for cases where the cause has not been set down for the examination of witnesses. In such cases publication is to pass at the time specified. But it has no application to cases where the cause has been set down for the examination of witnesses. Sections 6, 7, 8, 9 and 10 provide for that class of cases. Under those sections any party to a cause is allowed to have it set down for the examination of witnesses at any time after issue joined, upon giving fourteen days’ notice ; and the 10th section provides, that “*the witnesses of all parties are to be examined during the term for which the cause has been set down*, unless the court shall have seen fit, upon a previous application, to postpone such examination ; or unless the judge before whom the evidence is to be taken, shall see fit to postpone such examination, or to allow time for the production of further evidence ; and when such examination is postponed in the manner aforesaid, or when time is allowed for the production of further evidence, the order is to be upon such terms as to costs or otherwise as the court or the judge may think it right to impose.” It is quite clear, I think, that where a case has been regularly set down for the examination of witnesses, publication passes at the close of the term for which it has been so set down. Neither party is at liberty to adduce any further evidence. And in the present case the plaintiff having made default, and not having applied to postpone the examination, it was open to the defendant to have either examined his witnesses, or refrained from examining them, at his option, and in either event the plaintiff would have been excluded from calling witnesses. Publication, in other words, would have passed. If that be a correct view of the matter, of which I have no doubt, it follows that the present application is irregular, and in strict-

ness ought to be refused. The defendant should have proceeded to examine his witnesses. His doing so would not have given the plaintiff any advantage, because the plaintiff would have been thereby excluded from calling any witnesses except by leave of the court, a leave, I may add, which the court would be very slow to give where it would be attended with any risk of doing injustice to the defendant. But to refrain from calling his witnesses, and then to move for the costs of the day, was a course which it was not competent to the defendant to pursue.

But as the practice has been misunderstood, this may be treated, I think, if the parties desire it, as an application by the plaintiff to enlarge publication, and an order to enlarge publication may be made upon payment of the costs of the application, and of the costs of the day, including the costs of the defendant's witnesses.

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### BOSTWICK V. SHORTIS.

*Garnishee order—Examination of defendant.*

The Court will grant an order for the examination of the defendant for the purpose of ascertaining what debts are due the defendant under the statute 22 Victoria, chapter 33, section 12, with a view of garnisheeing such debts.—[THE CHANCELLOR.]

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### GIBSON V. CLENCH.

*Attorney-General—Costs.*

The Attorney-General is never made to pay costs, even upon interlocutory applications.

This was an application on behalf of the Attorney-General to enlarge the time fixed for answering the bill filed in this cause. When the order allowing time was made, a question arose whether it should be granted on payment of costs. After taking time to look into the practice,

THE CHANCELLOR.—The only question here is, whether the Attorney-General, who applies for time to answer, is bound to pay the costs of the application. I was under the

impression that the recent statute 20 Vic., ch. 212, had introduced some new rule upon this subject. But that clause has no application to the present case; and irrespective of that statute, the rule seems settled, that the Attorney-General never pays costs, even upon interlocutory applications.—*Attorney-General v. Corporation of London*, 12 Beav. 176 and 8.

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### GRANGE v. CONROY.

[October 31.

*Order pro confesso after six months.*

An order *pro confesso* was granted *ex parte*, although more than six months had elapsed from the service of the bill, the long vacation having intervened.

In this case *N. Kingsmill* for plaintiff, moved *ex parte* for an order to take the bill *pro confesso*, after the lapse of more than six months from the service of the bill. It appeared that personal service of the bill had been effected within the jurisdiction early in the month of May last.

*SPRAGGE, V. C.*—The practice which the judges have laid down on these motions, when it appears that the service of the bill has been effected more than six months before the application, is to require notice to be given, but where such six months include, as here, the long vacation, perhaps the notice may reasonably be dispensed with; therefore let the order go as asked.

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### CRAWFORD v. BIRDSALL.

[November 12.

*Guardian ad litem to person of unsound mind.*

In moving to have a guardian *ad litem* appointed to a person of unsound mind it must be shown that he has not been so found by inquisition.—[*SPRAGGE, V. C.*]

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## RICE v. BROOKS.

[November 17.]

On a motion for a final decree of foreclosure, it appeared that in proceeding under a decree several persons were made defendants in the Master's office, whom the court thought were unnecessary parties to the taking of the accounts directed. The motion was refused, and the costs caused by making such unnecessary parties were ordered to be deducted from the plaintiff's bill; the amount then appearing to be due was ordered to be paid in two weeks, or in default, foreclosure.—[THE CHANCELLOR.]

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## KAY v. SANSON.

[November 18.]

*Notice of answer having been filed.*

When a motion is made to dismiss the bill for want of prosecution, the party moving must shew that notice of having put in an answer has been duly served.

This was an application to dismiss for want of prosecution. Notice of the motion had been served. The certificate of the state of the cause shewed that no proceedings had been taken in the suit since the filing of the answer, and that several months had elapsed since the answer had been put in, but no evidence was given of notice having been given of the time of putting in the answer; under these circumstances the application was refused.—[SPRAGGE, V. C., (ESTEN, V. C., concurring).]

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## FRASER v. BENS.

[November 19.]

In settling the terms and conditions of a sale under a decree, the plaintiff, who had the conduct of the sale had omitted to ask for a reserved bid, and the master issued his advertisement. On a motion to the judge in chambers, liberty to have a reserved bid was granted, and the master's advertisement of the terms and conditions of sale altered in accordance therewith, on payment by the plaintiff of the costs of the application.—[SPRAGGE, V. C.]

## RUSSELL v. ROBERTSON.

A mortgagee insuring the mortgage premises against accident or damage by fire, out of his own funds, is entitled to receive the amount of the policy in the event of loss for his own benefit, without giving credit therefor upon the mortgage.

This was a motion by *Cattenach* for a final decree of foreclosure in default of payment of the amount found due by the master's report. *W. Davis*, contra, read affidavits shewing that a sum of £500 had been paid to the holder of the mortgage, being the amount of a policy of insurance effected by him upon the mortgage premises, which had been destroyed by fire, and claimed to have credit for that amount on the mortgage, and a reference to the master to take the subsequent account.

**SPRAGGE, V. C.**—The question in this case is, whether a mortgagee who insured certain mortgaged premises in the sum of £500, without communication with the mortgagor, paying the premiums out of his own pocket, and not charging them against the mortgagor; and who, upon their destruction by fire, received the £500 from the insurers, is bound to deduct the amount, less the amount paid for premiums, from the mortgage debt.

The question was in effect decided by Sir James Wigram, in *Dobson v. Land*, (8 Hare, 216.) The point considered in that case was, whether a mortgagee, having insured the mortgaged premises for his own protection, in the absence of any assent shewn from the mortgagor, could charge the premiums against the mortgagor; and in the argument, as well as in the judgment, the right of the mortgagee to such premiums against the mortgagor, and the right of the mortgagor, in the event of the premises being destroyed by fire, to have the sum payable on the policy laid out in the restoration of the premises, were treated as convertible: and Sir James Wigram observing that he had great difficulty in seeing why a mortgagee should not, as between himself and the mortgagor only, be allowed to make any contract he pleased collateral to, and not affecting, the mortgaged premises; just as a lessor or lessee may insure the leasehold property against fire without giving

the other any interest in the policy; held, the mortgagee not entitled to charge the mortgagor with the premiums.

I do not find that either question has since been raised in England; but I find a case reported from the Supreme Court of Massachusetts—(White v. Brown, 2 *Cush.* 412,) involving precisely the question which has been raised here. A sum of money had been received upon a policy effected under the like circumstances; and the master, in allowing the mortgagee for repairs, deducted the sum so received by him; but this the court overruled, observing: “The defendants alone effected the insurance, and are exclusively entitled to the benefit of it, and the amount received by them under their policy could not properly be taken into the account in adjusting the amount for repairs between them and the plaintiff. If a mortgagee gets his interest insured and receives the amount of the insurance under his policy, it does not affect his claim against the mortgagor.”

I have examined some English cases arising out of insurances upon life. In *Ex parte Lancaster* (4 *DeG. & S.* 524,) such insurance was effected by the grantee of an annuity, without any stipulations between himself and the grantor, and the question was, to whom the policy belonged, upon the annuity being redeemed by the grantor. It was held to belong to the grantee.

The same question arose in *Gottlieb v. Cranch*, (4 *D. M. & G.* 440,) and was decided in the same way; the grantor in that case, paying to the grantee an annual sum to pay the premiums on the insurance; which sum was adjudged by the court to belong to the grantee, being nothing more than a statement of the calculation made as a foundation of the terms on which the grantee advances his money; and therefore not distinguishing the case from that where the grantee of the annuity himself pays the premiums without any agreement with the grantor.

*Lea v. Hinton*, (19 *Beav.* 324) was the case of a life policy to secure a debt, and the question was one of fact, whether it was to secure a debt due to Mr. Hinton, who effected the insurance, or a debt to a third person for which

Mr. Hinton was security. The evidence convinced Sir John Romilly that it was the latter; but he said, there could be no question that if Mr. Hinton had effected the policy to cover a debt due to himself, and the insurance company had paid the amount, no one representing the person whose life was insured, could have any claim upon it. In that case, as in this, the amount payable under the policy was received by the person who effected the insurance, and the Master of the Rolls intimated a very clear opinion that that circumstance would not affect his right to secure, if a creditor, the full amount of his debt.

I have looked at the case of *Henson v. Blackwell*, (4 Hare, 434,) in which Sir James Wigram may be understood, without, however, in terms so expressing himself, to intimate that moneys received on a life policy to secure a debt effected without the privity of the debtor, should go in satisfaction of the debt; but this would hardly agree with his later judgment in *Dobson v. Land*; besides the other authorities to which I have referred.

I think the mortgagor in this case not entitled to have the amount received under the policy of insurance applied in reduction of the mortgage debt.

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#### TAYLOR v. STEAD.

Where a mortgagee institutes proceedings to foreclose against the mortgagor, and the estate of a deceased *mesne* incumbrancer, the real representatives of such deceased incumbrancer are not necessary parties.

This was a motion for the final decree of foreclosure, default having been made in payment of the amount found due. The real representatives of a deceased mortgagee, subsequent to the plaintiff, had been made parties to the bill, and the usual reference to the master had been directed at the hearing. After taking time to look at the pleadings,

**THE CHANCELLOR.**—This is a bill to foreclose by a first mortgagee having the legal estate against the mortgagor and a subsequent mortgagee. The subsequent mortgagee being dead, the bill was filed against his real and personal repre-

sentatives, and as the former are numerous, the costs of the suit have been very materially increased. It is clear that the real representatives of the mortgagee were not necessary parties—Whitla v. Halliday, (4 D. & W. 267; Fisher on mortgages, 211,) and the bill as to them should have been dismissed at the hearing, with costs. But as my brother *Spragge* had some doubt upon the subject, and was understood to assent to the decree, and as no objection has been made by any party, I do not feel that I can properly interfere at this stage of the cause. The foreclosure order may therefore be drawn up.

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### WILSON v. SWITZER.

*Costs—Set-off—Rights of solicitor.*

A. having obtained a decree against B. for payment of a large sum of money, issued an attachment to enforce payment, upon which B. was arrested. The attachment was afterwards set aside for irregularity, and an action for false imprisonment brought by B. against A. and his solicitor. An injunction to restrain the proceedings at law was granted, but A. and his solicitor were ordered to pay B. his costs of the action at law, and of the motion for injunction. On an application by A. and his solicitor to set-off these costs against the debt due by B. to A.,  
*Held*, that the lien of the attorney at law for costs not having accrued, and by reason of the injunction, never could accrue, and B.'s right to the costs being derived from an order of this court, A. would have been clearly entitled to the set-off asked, had the costs been payable by him alone; but being payable by him and his solicitor jointly, and the debt being due to A. alone, whether such set-off could be made—*quære*.

The facts giving rise to this application appear in the judgment, and in the report of the motion to set aside the attachment. *Ante p. 44.*

*Blain*, for the application.

*Blevins*, for plaintiff, contra.

**SPRAGGE, V. C.**—The defendant, Seth Wilson, obtained a decree against the plaintiff for the payment of a large sum of money, and an attachment was issued to enforce payment, upon which the plaintiff was arrested and committed to prison. This attachment was afterwards set aside for irregularity, and the plaintiff then brought an action for false imprisonment against the defendant Seth Wilson, and his solicitor, Mr. Alexander McDonald. Upon their application to this court, after the action at law had proceeded some length, it was enjoined, and it was ordered that Seth Wilson and his solicitor, Mr. McDonald, should pay to the plaintiff his costs of the action at law, and of the application for injunction. And the present

application is, that those costs may be set off as far as they go, against the debt due by the plaintiff to Seth Wilson.

It is very clearly settled, that in this court the lien of a solicitor for his costs is subordinate to the equities between the parties, and that it does not extend beyond what is the true balance due from one party to another. In *Taylor v. Popham*, (15 Vesey 72,) Lord Eldon, said: “The doctrine of this court, however, has always been that where, in a cause comprising a great number of questions, costs may ultimately be due to both parties, and sums to be paid as duties to each, the demands of both shall be arranged so as to do justice between them ; and the lien of the solicitor is only as to those costs which, upon the whole taken together, one party can claim from the other.” And again, “I have a strong notion that the doctrine of this court has all along been that when different demands arise in a cause, the costs should be arranged as the equities between the parties require, without considering the solicitor.”

The rule has been followed by Lord Manners, in *Shine v. Gough*, (2 B. & B. 33;) by Lord Gifford, in *Harmer v. Harris*, (1 Russ. 155;) by Lord Langdale, in *Bawtree v. Watson*, (2 Keen, 713,) and in *Cattell v. Simons*, (6 Bea. 304,) and by the Master of the Rolls in Ireland, Mr. Blackburn, in the *Marquis of Salisbury v. Maguire*, (7 Irish Eqy. 499.)

It is objected, however, that this rule does not apply when the costs sought to be set off accrued in one court, and the costs or dues against which they are sought to be set off in another, although the parties to receive and to pay respectively are the same.

*Shine v. Gough* is against this distinction ; the costs ordered to be set off there being incurred by one party in equity, and by the other at law ; the one party having obtained a decree, and the other a judgment at law, the application was by the plaintiff in equity, and it was contended that the costs might properly be set off, on the ground that the suit being instituted to stop proceedings at law over which a court of equity has jurisdiction, it was competent for it to set off those costs, and the Lord Chancellor granted the application. The *Marquis of Salisbury v. Maguire* was also a case where costs at law and in equity were set off, the one against the other.

On the other hand, *Wright v. Mudie*, (1 S. & S. 266,) is an

authority the other way. The plaintiff at law having brought his action in the King's Bench, the defendant filed his bill for discovery in aid of his defence, and the plaintiff at law was nonsuited, and Sir John Leach refused the application of the plaintiff in equity to set off the costs, observing that *Taylor v. Popham* was not an authority for setting off costs in equity against costs in the King's Bench, when it is clear that that court would not permit the set off of costs there against the costs in equity. The circumstances in the *Marquis of Salisbury v. Maguire* were precisely similar; and *Wright v. Mudie* was cited, but the decision was the other way. The reason is not given.

In the late case of *Collett v. Preston*, (15 Bea. 358,) before the present Master of the Rolls, the defendant had brought an action against the plaintiff upon a mortgage made to him as trustee for Finch and others, in the action he was nonsuited, and costs were taxed against him. The suit in equity was instituted for the purpose of having it declared that the mortgage was void for fraud, and for its cancellation. The bill was dismissed with costs. The plaintiff in equity applied that the costs payable by him under the decree might be set off against those recovered against him at law. Sir John Romilly, after taking time to consider, refused the application, observing that he could not grant it without interfering with the solicitor's lien, or consistently with the authorities and principles of the court.

In that case, and *Wright v. Mudie*, the defendant in the action at law was in a condition to enforce against the plaintiff payment of the costs of suit; and by the rule of the court in which the action was pending, the attorney for the successful party had a lien upon the costs to recover them against the unsuccessful party. Now if a court of equity were to make an order for the set off against such costs, of costs, or of money otherwise adjudged payable by its order or decree, it would intercept the lien of the attorney at law, and so interfere with a right recognised by the common law courts as existing in their attorneys. Besides, I do not see how such an order, if made, could be carried out, except by an injunction restraining the attorney at law from proceeding at law to recover his costs; and such an injunction could hardly be

asked for. But in this case, as in *Shine v. Gough*, the attorney at law is not in a position to enforce his costs at law, and never can be, as this court has enjoined the plaintiff from proceeding any further in that court; and he owes his right, or rather his client owes his right, to receive them from the defendant at law only to the order of this court. This court, therefore, if it ordered the set-off asked for, would not be interfering with the lien of the attorney at law, because no such lien had accrued. *Shine v. Gough*, therefore, does not appear to be in conflict with *Wright v. Mudie*, or *Collett v. Preston*, but to be distinguishable upon the ground I have stated.

In the case before me, the defendant, Seth Wilson, is entitled by the judgment of this court to a large sum of money from the plaintiff, and he proposes to deduct from that sum the amount of the costs at law, and of the application for the injunction: the latter, I suppose, can admit of no question, and as to the former, I think that the mere circumstance of their being costs at law does not disentitle Seth Wilson to what he asks.

The Vice-Chancellor added, that he had thus disposed of the question argued before him; but there was another question which had not been raised, namely, whether the debt being from the plaintiff to Seth Wilson, and the costs payable by Seth Wilson and *Alexander McDonald* to the plaintiff, and so, what was due being in different rights, they could be set off, he inclined to think that they could not, but if the parties who sought to make the set-off desired to be heard upon the point it might be spoken to.\*

#### CROOKS v. STREET.

*Master's report—Practice.*

Where the master, in proceeding to take an account under decree or further directions, finds he has made a mistake in taking the accounts under the original decree, he is not at liberty to correct such mistake by his subsequent report.

The master having, without the order of the court, reviewed his first report, and corrected by his subsequent report an error found in the first. *Held*, that the master exceeded his jurisdiction, and that the objection being apparent on the face of the report, the objecting party was not driven to appeal.

The facts giving rise to the present motion are fully stated

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\* Afterwards spoken to, and set-off disallowed, for the reason suggested by the V. C.

by his Lordship the Chancellor, before whom the application was made.

*Morphy*, for the plaintiffs, who apply.

*Brough*, contra.

Howell v. Kightley (2 Jur. N. S. 455,) Ware v. Watson (Ib. 129,) Turner v. Turner (1 J. & W. 39,) were cited by plaintiff's counsel to shew that defendant should have appealed if dissatisfied with the report.

THE CHANCELLOR.—This is a motion for an order directing the defendant T. C. Street to pay into court the sum of £859 12s. 2d., found due by the master's report, dated July, 1859.

Mr. *Brough* objects on behalf of Mr. Street, that the master has plainly exceeded his authority, in having varied a report previously made by himself, without the sanction of the court, and contrary to the decree on further directions.

Mr. *Morphy* contends, that the defendant, who has not appealed from the report, is no longer in a position to urge the objection upon which his counsel insists, the report having become long since absolute.

The decree, which was pronounced so far back as the 12th of January, 1849, declares, so far as it is material to the present motion, first, that the defendant T. C. Street is a trustee as to all lands which were of John Crooks, deceased, which were purchased by Samuel Street, the defendant's testator, at sheriff's sale, under writs of execution issued upon the judgment at the suit of John Fisher. Secondly, that the said defendant is entitled to the amount due upon the judgment recovered by Fisher, with interest, costs, and expenses thereon. Thirdly, that the said defendant, T. C. Street, is entitled to be credited in account with all moneys paid by the defendant's testator, Samuel Street, on foot of two several judgments recovered by the defendant James Leslie, against the personal representatives of John Crooks, and of William Crooks. Fourthly, that as to the residue due upon the said last mentioned judgments, the said defendant is a trustee as to one moiety for the said Leslie, and as to the other moiety for the estate of John Crooks. The master is then directed to take an account of what is due to the defendant on foot of the Fisher judg-

ment, and of the amounts paid by the defendant's testator on foot of the judgments recovered by Leslie, and it then provides that "in case it shall appear upon taking such accounts that the moneys received by the said S. Street and T. C. Street, shall exceed the amount due upon the said judgment recovered by Fisher, and the amount paid by the said S. Street in respect of the judgments recovered by Leslie, and the one-half of the debt and interest of the residue of such judgments, &c., it is ordered that the said defendant T. C. Street, do pay such balance into the Commercial Bank of the Midland District, &c., to the credit of this cause, subject to the further order of this court."

Now the meaning of that decree does not appear to me to admit of any doubt. The master is directed in plain terms, to take the account between the defendant Street, and the estate of John Crooks, upon the principles prescribed by the decree, and in the event of a balance being found against Street, the decree orders him to pay it into court to the credit of the cause.

In his first report, made in pursuance of this decree, which bears date the 23rd of October, 1852, the master certifies that he had taken an account of all sums of money received by the said S. Street, and T. C. Street, *in respect of the sale of the said lands, and whether arising from the sale thereof, or from the rents and profits thereof, or otherwise, and found the same to amount to £1135 12s. 2d.* The report next ascertains the several sums due to the defendant on foot of the judgments mentioned in the decree, and in accordance with its directions, and the master certifies that the sums so ascertained, with interest, costs, and charges, amounted to £2710 14s. 0 $\frac{1}{2}$ d., "the same exceeding the said sum of £1135 12s. 2 $\frac{1}{2}$ d., so received by the said S. Street, and T. C. Street, by the sum of £1575 1s. 10d."

The master acted, therefore, as it appears to me, in exact accordance with the decree. He took the account between the defendant and the estate of John Crooks, and he certifies that the balance due to the defendant on foot of that account, at the date of his report, was £1575 1s. 10d.

There was a further report on the 15th of February, 1858, but it is not material to the question before me.

The cause was then heard upon further directions, and the decree pronounced upon that hearing refers it to the master to take an account of the moneys received by the defendant, *by way of purchase money of the lands in the pleadings mentioned, or otherwise, since the period to which such account has been taken, as referred to in the said report of the 23rd day of October, 1852*, also an account of what, if any thing, remains due to the defendant in respect of judgments purchased by the said S. Street, as in the said report mentioned."

Now there cannot be a doubt, as it seems to me that the decree, on further directions, is based upon the report of October, 1852, and directs the account between the defendant and the estate of John Crooks to be continued from that date on foot of the account then taken by the master.

The report made in pursuance of the decree, which bears date the 8th of July, 1859, states with great particularity the conclusion at which the master had arrived in his report of October, 1853, in relation to the account between the defendant and the estate of John Crooks, and then proceeds in these words: "And I find that in taking the said four last mentioned accounts, as in my said report mentioned, there was no set-off made of the said sum of £1135 12s. 2½d., received by the said S. Street, and T. C. Street, as the same was received by them from time to time in satisfaction of the principal and interest of the sums due to them respectively from time to time, in respect of the said Fisher and Leslie judgments, &c., and that no balance was struck as between the said T. C. Street, and the estate of the said John Crooks, in taking the said accounts. And I find that the estate of the said John Crooks is entitled to interest on the several sums making together the sum of £1135 12s. 2d., as the same were received from time to time up to the date of my said report of the 25th of October, 1852, as a set-off against the interest allowed as aforesaid in respect of the said Fisher and Leslie judgments, and I have computed the same accordingly on the aggregate of such receipts in each year, from the end of the year in which the same were received, to the date of my last mentioned report, and I find such interest amounts in all to the sum of £337 13s. 1½d."

It is clear, therefore, that the master has not continued the accounts between the defendant and the estate of John Crooks from the date of his previous report, and on foot of the accounts then taken, as directed by the decree. On the contrary, he has reviewed and materially varied his previous report, by charging the defendant a large sum on account of interest, a sum with which the defendant ought to have been charged in the previous account, if chargeable at all, because it is clear beyond question that the power of the master to deal with the matter was as ample then as now. (a) It is clear, therefore, that the master has exceeded his jurisdiction, and as the objection is apparent upon the report, the defendant was not driven to an appeal, but is entitled to insist now that a further reference must be directed.

In ordering the master to review his report, I would not be understood as intimating any dissent from the conclusion at which he arrived. But however clear it may be that the defendant should be charged with interest upon his receipts, it is no less clear that it was not competent to the master to correct the error into which he had fallen by varying his former report, contrary to the decree on further directions. It may not be too late even yet to get at the justice of the case, which seems sufficiently obvious; but it must be got at in the regular way; and as the course pursued by the master was plainly irregular, he must be directed to review his report.

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### BALDWIN v. BORST.

[February 25.

*Setting down demurrer.*

Where a party files and sets down a demurrer for argument at the same time, he will be considered to have waived his right to taxed costs. Plaintiff is entitled to two clear days' notice of a demurrer being filed before the defendant can set it down for argument, unless he is willing to waive his right to be paid taxed costs.

This was an application to strike a demurrer out of the paper of causes for irregularity, on the grounds set forth in the affidavit filed, which stated that the notice of filing the demurrer and the notice of setting down the same were served at one and the same time: that no order had been

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(a) See order 142, of April, 1843.

served or obtained for setting down the demurrer: that the solicitor for the plaintiff had no opportunity of perusing or considering the same previously to its being set down for argument, by reason of which it was apprehended that plaintiff had lost his right of submitting to the demurrer except on the terms of paying taxed costs, and that had an opportunity been afforded plaintiff of so doing, he would have submitted to the demurrer and amended his bill. Under these circumstances, *Barrett*, for the plaintiff, contended the proceeding was wholly irregular and ought to be set aside with costs. Smith's Prac. 294; Ayckbourn's Prac. 92 *et seq.*

*Strong*, contra.—The usage of the profession since the promulgation of the orders of 1853, justifies the course which has been adopted by the defendant's solicitor in this instance. By the eleventh of those orders it is provided that “*upon the filing of a demurrer either party is at liberty to set the same down for argument immediately*,” and causes are set down for hearing in precisely the same manner.

**ESTEN, V. C.**—The former practice was to file the demurrer and enter it with the registrar within eight days: after which either party could set it down for argument by petition and order. The present practice in England is not to enter the demurrer, but it may be set down by either party immediately (which means, I think, without being entered) on petition and order; which necessarily gives time to the opposite party, who has notice of it the day it is filed, to submit to it. Our general orders seem only to dispense with entering; and demurrers should have been set down by petition and order. The contrary practice, however, has been introduced, and may be considered established: but it is highly reasonable and proper that an opportunity should be afforded to a plaintiff of submitting to the demurrer; and I think that a party who sets down his demurrer on the same day that he files it, must be considered as waiving his right to taxed costs on a submission to it within a reasonable time, which may be said to be the next four days, both inclusive.

I must refuse this application, because it asks what I do not think it right to grant, but I refuse it without costs, because I think the defendant was wrong to set down the demurrer *eo instante* that it was filed ; and because the plaintiff under such novel circumstances, and in the uncertain state of the practice, was at a loss to know what course to pursue. Having proceeded with reasonable promptitude under the circumstances, I think he is entitled to an order to amend on payment of 20s. costs, but as the registrar would be at a loss to know how to draw up the order without a special direction, I think it right now to save a new application to the court to provide for it by the present order.

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#### MCLEAN v. BEATY.

*Proceedings at law and in equity—Election.*

The plaintiff in an interpleader issue at law having filed his bill for relief in this court while the interpleader is pending, is not bound to elect.

This was an application to discharge an order which had been obtained by the defendant upon preceipe calling upon the plaintiff to elect whether he would proceed in this court or at law.

*McLennan*, for the plaintiff.

*Boulton, (G. D.,) contra.*

ESTEN, V. C.—The plaintiff sued Beaty at law, and the matter having been referred, and an award made in favour of the plaintiff, he entered up judgment, issued execution, and seized the interest of Beaty in the goods in question : whereupon the sheriff obtained an interpleader issue, and at the trial the matter was referred to Mr. Dalton, and the reference is still pending before that gentleman. It does not appear when the bill was filed ; whether before or after the interpleader issue was ordered, or whether before or after the

trial and reference to arbitration ; but in either case I think it cannot be said that the plaintiff is pursuing the defendants at law and in equity, and doubly vexing them with litigation. The interpleader issue was not of his seeking, and although he may be the plaintiff in it, it was instituted by and for the satisfaction and protection of the sheriff : the plaintiff is compelled to proceed with it, or surrender the subject in dispute, and he has not that absolute control over it which I apprehend an order to elect pre-supposes. The reference to Mr. Dalton is merely a mode of terminating a litigation not promoted by the plaintiff I think in the sense which is implied in an order to elect. It is possible, indeed, that the interpleader issue, although instituted by the sheriff, may interfere with the relief to be given to the plaintiff at the hearing, on the ground that a proceeding was pending, when the suit was instituted, in which he could obtain the whole relief to which he was entitled. Upon this point I express no opinion ; but supposing it to be so, this is a different question from that of double vexation, which has not, I think, occurred in this case in the way contemplated by the order to elect, which, as having been obtained, in my judgment, upon a false allegation, must be discharged with costs.

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### GRAHAM v. MACPHERSON.

*Foreign affidavit.*

An affidavit purporting to be sworn before the mayor of a city in England is inadmissible in this court without proof of his signature and authority to administer oaths : but where the affidavit is sworn out of England it is receivable as evidence in the courts of this country under the provisions of the imperial statute 14 & 15 Victoria, chapter 99.

This was an application by *Roaf* for a final decree.

SPRAGGE, V. C.—The affidavit of the plaintiff in this case purports to have been sworn before the mayor of Oxford, England, and Mr. *Roaf* contends that this should be received by this court upon what appears upon its face, without more,

as an affidavit duly sworn, and he refers to imperial acts 14 & 15 Vic., ch. 99, and 15 & 16 Vic., ch. 86.

By the 11th section of the former act it is provided that "every document which by any law now in force, or hereafter to be in force, is, or shall be admissible in evidence of any particular, in any court of justice in England or Wales, or Ireland, without proof of the seal or stamp or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purposes in any court of justice of any of the British colonies, or before any person having in any such colonies by law, or by consent of parties, authority to hear, receive and examine evidence, without proof of the seal or stamp, or signature authenticating the same ; or of the judicial or official character of the person appearing to have signed the same." The question then is, assuming the word document to include an affidavit, which looking at the 7th section of the same act, I think it does, whether the paper presented in this case as an affidavit would, without more, be admissible in evidence as an affidavit in courts of justice in England or Wales, or Ireland, and upon this point I am referred to section 7, of the same act, and section 22 of 15 & 16 Vic., ch. 86. The former provides for the mode of proof (in England and Ireland, as appears by the preceding section) of, among other things, judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court ; and as to authenticated copies, it provides in substance, that they shall be admissible in evidence without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement. It is not necessary to decide whether this section applies, as to affidavits, to any but those filed or deposited in court.

The 22nd section of the latter act enacts in substance, that

all pleas, answers, disclaimers, examinations, affidavits, and attestations of honour, in causes or matters depending in the High Court of Chancery, and also acknowledgments for the purpose of enrolling any deed in the court, may be sworn or taken in Scotland, or Ireland, or the Channel Islands, or in any colony, &c., before any judge, court, notary public, or person legally authorised to administer an oath, or before consuls and vice-consuls in foreign parts, out of the Queen's dominions; and that judicial notice shall be taken by the Court of Chancery of the seal or signature, as the case may be, of the court, judge, or other person before whom the paper purports to have been sworn or taken.

To sum up these provisions in few words, and to confine them to affidavits, an affidavit being offered here; they provide for the admissibility as evidence *in England* of affidavits sworn *out of England*, and for the admissibility in colonies of that which is admissible in England; and the thing to be shewn, is, whether an affidavit to be used in a court of justice in England (the latter section applying only to the High Court of Chancery) purporting to be sworn before the mayor of Norwich, would, without more, be admissible as evidence in England. There is nothing to shew that it would be so admissible, and I apprehend that it would not. My opinion, therefore, is, that the imperial acts referred to do not make the so called affidavit of the plaintiff, offered in this case, admissible.

The practice of the court under the general orders, in absent defendant cases, is referred to. The orders in the cause direct that the affidavit of service and identity may be sworn before a mayor or chief magistrate abroad; and the court has been in the habit of receiving, what purported to be the signature of a mayor, and the seal of a municipality, where there was a seal, as in fact what they purported to be, and to assume the authority of such magistrate to administer oaths. It may be that the practice in these cases has been somewhat loose, and that the court has assumed that which, according to the English cases, required proof. This is not one of these cases, and besides, there is not in this case what

there has been in those referred to, authority to any mayor or chief magistrate to take such affidavit; or rather an order of the court that an affidavit sworn before him shall be admissible. I think, therefore, that this paper cannot be read as an affidavit.

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### MOODY v. McCANN.

#### *Production of evidence in master's office.*

Where a party upon whom the onus of proof lies produces a receipt, or other proof of a conclusive nature, and closes his evidence; and the other side produces testimony tending to shake this evidence, further evidence in support will be allowed to be produced, though in strictness it may be such as might have been produced in the first instance.

This was a motion by way of appeal, from a decision of the master, refusing to allow the plaintiff to adduce further evidence for the purpose of substantiating the case made by him before the master.

*Read*, for the plaintiff.

*Brough*, contra.

ESTEN, V. C.—With considerable doubt and hesitation I have come to the conclusion that I ought to admit this evidence, although it is evidence in support of the affirmative of the issue, and which would with propriety have been adduced in the first instance; and I go upon the ground that the receipt was evidence of that conclusive nature until shaken; that the party upon whom the *onus probandi* lay was justified in relying upon it, in the first instance. I admit, however, that the introduction of the fresh evidence seems to violate the rule that the party upon whom the burden of proof lies is not justified in making a *prima facie* case, and when that is shaken, in adducing fresh evidence in its support. Nor do I think the proposed new

evidence can be fairly considered as in contradiction of the defendant's evidence. Such evidence must, I think, be confined to disproving the particular facts proved by the opposite party ; or to explaining or rebutting those particular facts ; and it must not be general evidence in support of the affirmative of the issue, which this evidence, proposed to be offered, is. As already observed, I proceed upon the ground that the receipt being in its nature conclusive until shaken, the party bound to prove the issue was warranted in relying upon it in the first instance without resorting to additional proof. Had he known that it was intended to impeach or displace the release, I think he would have been bound to adduce all his evidence in the first instance. But this is not clear, as the answer was never in fact introduced upon the files, and it does not appear that it was seen by the opposite party. The defendant will be entitled to adduce evidence contradicting or rebutting the fresh evidence, that is, disproving the particular facts proved by it, or explaining them, or obviating their effect ; but he will not be entitled to adduce general evidence in support of the negative of the issue, which he ought to have exhausted in the first place, as he had no evidence similar to the receipt, of that conclusive nature *prima facie*, which would warrant him in stopping, and forbearing to offer any further proof. I consider myself as standing in the position in which the chief clerk would have stood, had Mr. Hine, instead of saying that the evidence was closed, had expressed a desire to adduce further evidence, and asked an appointment for that purpose ; which, in that case, I think, should have been granted. I give no costs of this application, but think that the plaintiff ought to pay the costs of the application to the chief clerk.

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## SCARLETT V. THE CANADA COMPANY.

[March, 7.

*Covenants in deeds from the Canada Company.*

The Canada Company, by their charter, are not exempted from giving to purchasers of the lands granted to them by the Crown the usual covenants against their own acts; and as to lands which the company may have obtained by purchase from private individuals, the company will be required to give the same covenants as another vendor.

In this case a decree had been made for the conveyance by the defendants to the plaintiff of a lot of land in the township of York. In settling the conveyance, a question arose whether the company were bound to enter into any covenants as to the title, or whether the short form of deed given in the imperial statute 6 Geo. IV., ch. 75, was not the only conveyance they could be compelled to execute; the eighth section of the act declaring that "such conveyance shall be valid and effectual in law to all intents and purposes whatsoever."

*Hector*, for the plaintiff.

*Brough*, contra.

ESTEN, V. C.—No doubt the short form given by the act authorising the incorporating of this company, was given to avoid the necessity of making a lease for a year or other circuitous mode of proceeding. I cannot suppose that the legislature intended that a purchaser should not be entitled to demand from the company, for his security, a covenant against their own acts, even as to lands granted by the Crown; and as to lands purchased by the company from private persons, which it appears the land in this instance was, I should think the company would be bound to enter into all the usual covenants.

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## MAUGHAN WILKES.

*Attachment against a married woman.*

A married woman, defendant, living with her husband, was ordered to bring certain accounts, as administratrix, into the master's office, and having disobeyed the order, an application to commit her for contempt was refused, the general rule being that the husband must answer for the wife's default, unless he shews some ground of exemption.

In this case an order to administer the estate of the late Walter Ewing Buchan had been obtained and carried into the master's office. In proceeding to take the account, the master had issued his warrants requiring the defendants, one of whom was a married woman, to bring certain accounts relating to the estate into his office, which having been disobeyed by her a motion was made by

*Freeland*, for an order to commit for contempt; but, after taking time to look into the authorities,

SPRAGGE, V. C.—This is an application for an order for the commitment of the defendant Anne Wilkes, a married woman, for contempt, for not bringing into the master's office certain accounts directed by the master to be carried into his office, she having, as his certificate states, been duly required so to do. Anne Wilkes is made defendant as administratrix of the estate of Walter Ewing Buchan, deceased; her husband is made a co-defendant.

Upon the application being made, I stated that it was my impression that the application could not be granted, and on a subsequent day I was referred to two cases in support of the application. One of them, *Bunyan v. Mortimer*, (6 Mad. 278,) only decides that an attachment cannot issue against a married woman for not answering, without a previous order that she should answer separately from her husband. In the other case, *Otway v. Wing*, and *Wing v. Otway*, (12 Sim. 90,) an order was made against a married woman for the payment of money; but upon the express ground that she as plaintiff constituted herself a single woman for the purposes of the suit, and must take the consequences of disobeying the orders of the court made upon her as plaintiff.

I do not think that these cases warrant the application that

is made. According to the English cases the general rule is that the husband is in contempt, and is punishable by attachment for his wife's default. If she fail to answer he is liable to attachment, although he answers himself; and he is only excused upon shewing his inability to get his wife to answer. By the practice of this court, there being no attachment for want of answer, an order for the wife to answer separately goes as of course in a proper case, after the expiration of the time for the husband and wife to answer, in order to the bill being taken *pro confesso* against the wife, and I am informed that in this case such order has been obtained.

An attachment will issue in England against a married woman for not answering after order obtained that she shall answer separately; but it does not seem to me to follow that she is to be treated as a *feme sole* in all subsequent proceedings in this court, because she has allowed the bill to be taken against her *pro confesso*. The order to answer separately has not been obtained by her; but in a proceeding taken by the plaintiff being the only course by which he can get on in his suit.

The general rule, then, appears to me to be untouched, that the husband shall answer for the wife's default unless he shews some reasons for being exempted. She is assumed to be under his control, and he must shew the fact to be otherwise. And this rule will apply much more forcibly in regard to the act, sought to be enforced here, than in regard to an answer, for it may be impossible for a husband to prevail upon his wife to put in an answer upon her oath; and the court would punish a husband for contempt who by threats compels a wife to put in an answer—(Exp. Halsam, 2 Atk. 49,) but the preparing and bringing in of accounts would, as a matter of business, more naturally devolve upon the husband than the wife; though of course her oath would be requisite, and he might be able to shew that he was unable to prevail upon her to do what was necessary.

The nearest case that I have found to the present is that of Scarrow v. Walker, referred to in the last edition of Smith's Practice, page 542, where an order for a sergeant-at-arms having been made against a *feme sole*, she married, and an order was made that the husband and wife should

put in an examination within one month after personal notice, or in default, that the sergeant-at-arms should go against the husband.

The case of the Attorney-General v. Adams, (12 Jurist, 637,) is a strong case against attachments issuing against married women; the woman in that case had not gone by her husband's name; when the subpoena was served she stated that she was unmarried, and throughout the proceedings in the suit she was treated as unmarried; she was attached for want of answer, and committed to prison, and the fact of her marriage was first discovered upon her application to be discharged. Lord *Cottenham* made an order for her discharge, and refused to impose as a condition that no action should be brought.

The distinction that obtains where a decree is made against a married woman is important upon the same point. The general rule is, that decrees are enforced *in personam*; but the case of a decree against a married woman is a recognised exception to the rule.

The case of Pemberton v. McGill is referred to in a note to the last edition of Smith's Practice, (page 275, n. 4, 25 L. J., ch. 49,) where, as I infer, process was ordered against a married woman. The case is thus stated: "A *feme covert* executrix, beneficially interested under a will to her separate use, living apart from her husband, had, without proving the will, possessed herself of the assets, and parted with a portion of them. In a suit by her co-executor she had appeared and answered separately, it was held that she could not by her coverture protect herself from answering as to the proceeds of the assets, of which she possessed herself." The order was probably made against the wife in consequence of the fact of her living apart from her husband. Upon the whole, I think the application must be refused.\*

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\*This was subsequently brought on by way of appeal before the Honorable V. C.C., when the judgment was affirmed.

## ROSS v. STEELE.

*Sale under decree—Parties to deed.*

A mortgagor or his heirs are not proper parties to a conveyance of the estate to a purchaser at a sale under the decree of the court.

In this suit a sale had taken place under the decree of the court, of certain premises mortgaged by the ancestor of the infant defendants, who were made parties to the conveyance by the solicitor of the purchaser, so that it became necessary for the conveyance to be approved by the judge in Chambers, so far as the interests of the infants were concerned; but

SPRAGGE, V. C.—This conveyance is submitted for my approval by reason of the infant heirs of the mortgagor being made parties. The conveyance is to a purchaser at a sale under the order of this court. I have held that the infants are not proper parties under such circumstances, and I find that the same has been held in England in *Re Williams*, (21 L. J., N. S. Chy. 437.) I think the mortgagor or his heirs not proper parties to a conveyance to a purchaser at the sale.

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## COONEY v. GIRVIN.

*Married woman—Motion by—Security for costs.*

Where in the course of a cause it becomes necessary for a married woman, a party to the suit, to make an application exclusively on her own behalf, she can do so, only, by her next friend.

This was an application on behalf of the defendant Arabella Girvin, who was made a defendant to this cause with her husband, for an order on the plaintiff to give security to her for such costs as she might incur in defending the suit.

*G. D. Boulton*, contra, stated a similar application had been refused by his Honor V. C. *Esten*; but

SPRAGGE, V. C.—The application made before my brother *Esten* was made by the wife on behalf of herself and her husband, and was refused on that ground probably, on the authority of *Oldfield v. Cobbett*, (3 Beav. 432.) This appli-

cation is by the wife alone for security for costs. It is objected that she has not applied to answer separately. I should not think that a necessary preliminary, but the rule is, that a motion by a married woman can only be made by her next friend. *Pearse v. Cole*, (16 Jurist, 214.) The application must therefore be refused.

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### CROOKS v. STREET.

*Sale under decree—Paying purchase money into court.*

A purchaser of real estate, at a sale under the decree of the court, will not be ordered to pay the amount of his purchase money into court until the title has been accepted or approved of.

In this case a sale by auction of certain real estate had taken place under the decree of the court, at which one James Metcalfe had become the purchaser of a portion of the estate sold, who having neglected to pay in his purchase money after several demands made upon him for that purpose, a motion was made by *Morphy*, for the plaintiff, for an order directing the purchaser to pay the amount of his purchase money into court.

*Hawkins*, contra.

*Per Curiam*.—This is an application for an order that Metcalfe, the purchaser of a portion of the property sold under the decree in this cause, may pay his purchase money into court.

The sale took place on the first of June, 1859. Ten per cent. was paid at the time of sale, in accordance with the conditions, and the residue was to be paid, and the conveyance executed, on the 22nd of August.

An affidavit has been filed in opposition to the motion, in which the solicitor for the purchaser states that he had applied repeatedly to the plaintiff's solicitor for an abstract of the title, but that up to the 22nd of August no abstract had been delivered; and Mr. *Hawkins* contends that the motion is irregular inasmuch as the title has neither been accepted nor approved, although he admits that an abstract was delivered a few days before the motion.

The practice upon this point is not so clear as we might have expected to find it; and certainly the course pursued by the plaintiff's solicitor in this case, has been, for some time, the uniform practice of this court. But it would seem nevertheless, the objection is well founded.

It is clearly settled now, although the point appears to have been doubted in Lord *Erskine's* time, that purchase money will not be ordered into court, even when the purchaser neglects to attend the motion, unless the title has been either accepted or approved, (2 Danl. Prac. 1 Eng. Ed. p. 919, and cases cited; *Rutter v. Marriott*, 10 Beav. 33,) and it is equally clear that the vendor's solicitor may move for a reference as to title when the purchaser neglects to take that step on his own behalf, (Sugd. V. & P. 11th ed. p. 71.) The practice is stated by Sir *Edward Sugden* in this way: "If the purchaser neglect to complete his purchase, the practice is for the seller to confirm the report, and then if the purchaser is supposed to be responsible, to get an order to enquire whether the party can make out a good title, and if he can, to obtain an order upon the purchaser to complete his purchase."

Now as the vendor has a right to an enquiry whether he can make out a good title, but has no right to an order for payment of the purchase money into court until the title has been either accepted or approved, it would seem to follow that the present motion is, under the circumstances, irregular. It cannot be regular to ask that which it would be clearly irregular to grant. And the books in ordinary use would seem to shew that view of the practice to be correct, although Mr. *Smith* would seem to state it differently. In *Ayckbourn's Practice* it is said, (3rd ed. p. 482,) speaking of the order to pay in purchase money, "an order for such purpose, however, cannot be obtained until the purchaser has either accepted the title, or the master, upon a reference as to title, has reported that a good title can be made." And in *Jarman's Practice* it is said at page 310: "But before this motion can be made he must have accepted the title; or it must have been certified that a good title can be made."

The motion, therefore, must be refused, but, under the circumstances, without costs.

## IN RE KENNEDY.

*Infants and the statute 12 Vic., ch. 72.*

In applying for the sale of real estate settled upon infants, the mother, by whom the application was made, was required to join in the conveyance for the purpose of surrendering the life-interest vested in her under the settlement.

This was an application by *Leith* on behalf of Mrs. Ferrie, for an order to sell a portion of the real estate settled upon her children by a former husband.

ESTEN, V. C.—I think I may fairly consider that Mr. Kennedy died insolvent, and that nothing is coming to the children from his estate. I think that Mrs. Ferrie should make an affidavit, or that it should be shewn to my satisfaction that the property she holds is hers absolutely, and that the children have no interest in it. It will then appear that the only property these children have is that mentioned in the petition. Mrs. Ferrie or her husband is not bound to maintain them. I think, therefore, that a proper case will then be presented for a sale of the Mountain property, as the produce of the Hughson-street property is wholly insufficient for the purpose, and the Mountain property being likewise exposed to waste and delapidation. I should, however, see the settlement. It may be necessary for Mrs. Ferrie to make an appointment in favour of her children. Mrs. Ferrie must join in the sale, and must surrender her life-interest for the maintenance and education of the children.

## RE McDONALD.

*Infants and the statute 12 Vic., ch. 72.*

In directing the sale of infants' real estates the court is not governed by the consideration of what is most for their present comfort, but what is for their ultimate benefit. The court will order a sale of a portion of an infant's estate to save the rest when it is made to appear to be for the benefit of the infant.

This was also a petition presented for the purpose of selling a portion of an infant's real estate to pay off a mortgage existing on another portion thereof, known as the Homestead.

ESTEN, V. C.—I think it may fairly be considered within the scope of the act to sell part of the infant's property to save the rest, when it appears to be for the benefit of the infant. In the present case the Homestead, consisting of 70 acres, is exposed to loss by reason of the mortgage to Beattie, who will be entitled to recover on it, I presume, whatever it may be necessary to pay to the government in respect of the 55 acres purchased by him from McDonald, and which appears to be part of the lot C., of which therefore the family appear to retain about 150 acres. The mortgage is evidently intended as an indemnity against the deed for the fifty-five acres not being forthcoming, and if the government would not accept a separate sum for the 55 acres, and the whole lot C. became lost through the default in payment of the government price, no doubt Beattie could recover the whole amount of his mortgage and interest. It may be expedient and for the benefit of the infants that the residue of lot C. should be sold in order to prevent the foreclosure or sale of the 70 acres, but it is impossible not to see that the mother who presents this petition is looking rather to the present comfort of herself and her children than to their eventual good. The interest of the infants, however, is the only thing that this court can consider, and in making the enquiries which I am about to direct, the master must bear this fact in mind, namely, that he is not to consider the present comfort of the family so much as the ultimate good of the infants. The evidence is very imperfect, and has not been properly taken, as it ought all to be taken by the master. I shall therefore refer it to the master at Sarnia to enquire and state what property real and personal Angus McDonald possessed at the time of his death, and what has become of it; what debts were due to him, and what debts he owed; to enquire into and state the particulars of the transactions with Beattie, and whether the 55 acres sold to him is not part of lot C. mentioned in the petition, as still belonging to the family; and to enquire into and state the condition of the 70 acres and of lot C. respectively, and how much is due on lot C., and the respective values of lot C., or so much of it as still belongs to the family, and of the 70

acres, and how much lot C., or so much of it as still belongs to the family, would probably produce on a sale; and how much money would be required to procure a patent to be issued for the 55 acres purchased by Beattie, and whether a patent could be procured for such 55 acres without procuring a patent for the whole lot C.; and if the master shall be of opinion that it is expedient, and for the benefit of the infants, that the residue of lot C. should be sold in order to exonerate the 70 acres from the mortgage to Beattie, he is to state his reasons; and in making the foregoing enquiry he is to consider only the interest of the infants, and he is not to take into account the comfort or welfare of any other person or persons, and he is to examine the infants separately and apart as to their consent to a sale of their interest in lot C., for the purpose before mentioned, and he is to explain the matter to them.

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## SIMPSON v. THE OTTAWA & PRESCOTT RAILWAY Co.

### *Receiver—Appointment of.*

A receiver, though an officer of the court, stands in the position of trustee to all interested in the estate or fund: therefore in making the appointment the court will endeavour to select a person unexceptionable to all parties, not only on the score of fitness and competency, but also as regards the feelings of friendship or dislike between the person proposed and those with whom he, in the discharge of his duties, will be likely to be brought into frequent communication.

In this case a receiver of the revenues of the railroad had been ordered, in consequence of the company having made default in payment of the interest due upon certain bonds of the company, and the plaintiffs having submitted the name of a person, his appointment was opposed on affidavits, setting forth that as between himself and the president of the company a strong feeling of antagonism existed, and that although perfectly fit and competent in all other respects, the consequence of his appointment would probably be that the interests of the company would sustain injury by reason of the want of friendly intercourse between the receiver and the persons interested.

The facts are more fully stated in the judgment.

*Read and Strong* for the plaintiff.

*McDonald*, contra.

SPRAGGE, V. C.—When a receiver is appointed it is on behalf of all interested in the estate or fund which he is appointed to receive ; and, therefore, though an officer of the court, he stands in the position of trustee to all.

The case of *Wilkins v. Williams*, (3 Ves. 588,) contains a strong expression of opinion by Lord *Loughborough* in favour of the appointment of a person proposed as receiver by a mortgagee ; but inasmuch as any loss occasioned by a receiver falls upon the mortgagor or his estate, he is clearly interested in the appointment of a proper person, and when the estate is a sufficient security, even more interested than the mortgagee.

With regard to Mr. Harris, the gentleman proposed in this case by the plaintiffs, his fitness as a man of integrity and business habits is not impeached. The objection is, that he and Mr. Bell, the president of the railway company, are upon a footing if not of hostility, still of unfriendliness towards each other, such as would probably operate to the prejudice of the company if he were appointed receiver. Mr. Harris, upon his examination, denies that he has any feeling of antagonism towards Mr. Bell, as president of the railway company, or individually. Upon being asked, however, if he had ever written anonymously in the newspapers against Mr. Bell, in any capacity, he denies having written against him as president of the railway company, or respecting the management of the railway, but he declined to answer further, on the ground that it was not a proper matter for cross-examination upon his affidavit. Upon being further asked if he had written letters published in the *Montreal Gazette*, reflecting upon Mr. Bell in any capacity, he says : “I cannot answer without seeing the letters, if there are any such.”

It is further suggested, that some ill-feeling exists on the part of Mr. Harris, arising out of the removal of the railway account from the *Montreal Bank*, of which Mr. Harris was and is the agent at *Ottawa* ; and which Mr. Harris says in his examination, were removed in spite of a pledge given to

the contrary. Political differences, Mr. Bell having been a candidate for the representation of Ottawa, are also referred to, but they do not appear to have been of such a nature as to make Mr. Harris objectionable on that score.

Now upon this application it is not necessary that I should adjudicate between Mr. Harris and Mr. Bell as if they were parties to a suit, or that I should find upon legal evidence whether Mr. Harris did write against Mr. Bell in the papers, as it is suggested that he did. Mr. Harris is proposed as a trustee, and in the discharge of his duties will, I apprehend, necessarily have to communicate with the president of the company upon its business affairs, how much or how little I am unable to say, But if, as is sworn, the road stands in need of considerable repairs, it must almost necessarily become a matter of discussion between the receiver and the president as to what is necessary, and how it should be done, and the proceedings necessary in this court in relation thereto, and so probably in relation to repairs from time to time ; new rails, new rolling stock, and the like.

If the motion was as to the appointment of a trustee to an estate upon which were mines, or a colliery, in which discussions as to conducting the business of the estate would necessarily arise between the trustee and the owner of the estate, such trustee being appointed for the protection of an annuitant or other creditor, would the court hold such objections as are set up in this case sufficient reasons against the appointment of such trustee ?

I think it would ; the court would think it desirable that the trustee and the owner of the estate should be mutually free from unpleasant feeling. It is not wise, *unnecessarily*, when two have to work together, to appoint as one of them a person between whom and the others there exists a feeling of unfriendliness, and as to such feeling on the part of Mr. Harris, I give full credit to his disclaimer of entertaining any feeling of antagonism against Mr. Bell, but cannot read his evidence without coming to the conclusion that he regards him unfavourably—I should say with suspicion and dislike—and I must add, that I think the inference is not a violent one, that he has written against him in the newspapers ; he himself says he cannot tell without seeing the letters, if any there are.

Apart from this feeling, the existence of which I must ignore, I have no doubt that Mr. Harris would be a perfectly fit and competent person for the proposed office, and I decline to appoint him simply because I think it inexpedient under the circumstances.

There is no reason why some person entirely unexceptionable should not be appointed ; the plaintiff should be at liberty to propose some such person, and I think that a preference should be given to the person named by him, if no valid objection exists against him.

It is not suggested that there would be any difficulty in finding such a person, and I think it would not be a sound exercise of discretion to place parties who have to act together in a false position, and that without any necessity for so doing.

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#### RE FREEMAN, CRAIGIE, AND PROUDFOOT, SOLICITORS.

##### *Costs—Taxation of.*

Where a solicitor offered to make a deduction from his bill, the court held that the master should not charge the solicitors with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction.

This was an application to vary the terms of an order made for the taxation of a solicitor's bill of costs against his client, under the circumstances stated in the judgment.

*McDonald* for the solicitors.

*Roaf*, contra.

ESTEN, V. C.—I do not think any of the grounds on which this order is impugned are tenable, except that it does not include all matters. The solicitors, however, waived this objection, and both parties proceeded under the order to a considerable extent : after which some difficulty arising in the master's office, and it being thought expedient to obtain a fresh order, they could not agree upon its terms. I cannot very well understand the contention with respect to the amount of the bill of costs. I think, however, that the solicitors were right in requiring the entire bill to be subjected to taxation ; and then in making the promised deduction ; but I think the master should not have charged them

with the costs of taxation, unless the bill had been reduced one-sixth by taxation independently of the voluntary deduction. The solicitors were not warranted, I think, in introducing the words limiting the time within which the report was to be obtained ; and they could, I think, have been held to their agreement, as evidenced by the correspondence ; but Mr. Davis, in his letter of the 18th of February, intimates that if Mr. Proudfoot insisted upon the introduction of the words objected to the agreement might be rescinded ; and Mr. Proudfoot replies with a letter, which amounts, I think, to an acceptance of that offer, and thus the agreement, which had been acted upon to such an extent, was rescinded, and the parties remitted to their original rights, and the solicitors entitled *stricto jure* to discharge the order : but under the peculiar circumstances, I think I ought not to discharge it, the client undertaking to pay to the solicitors all that is due to them in respect of other matters, and not to require the removal of the books from the office of the solicitors. I award no costs to either party.

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#### IN RE FOSTER.

*Consolidated Statutes U. C., ch. 86—Partition—Notifying incumbrancers.*

Partition, where ordered, is to be made by the real representative.

The question whether partition or sale should be ordered, is proper to be referred to the real representative, who is to make sale if ordered.

The court may order a sale in the first instance, if it see fit.

The court will use its own machinery for carrying the purposes of the act into effect.

This was an application by petition for partition under the act 20 Vic., ch. 65, Consolidated Statutes of Upper Canada, chapter 86, by *R. Martin* for the petitioners.

ESTEN, V. C.—All necessary parties are present, and therefore the petition may be allowed in terms of the act of parliament, and judgment of partition pronounced upon it. The order should define the estates of the different parties. I think some evidence should be offered as to the family of Hugh Foster, so as to shew who were his co-heirs. There is not even an affidavit in verification of the petition. The

real representative is to make the partition, if one be ordered. It would seem to be proper, if desirable, to refer the question of partition or sale to the real representative. (See sec. 21.) The real representative is to make the sale if it be ordered. No power of sale is expressly given except upon the report of the real representative ; but it would appear that the court can order a sale in the first instance, or upon the report of the real representative, if, on an order for partition, he should think a partition unadvisable, and should so report to the court. I am not at present satisfied that a sale is necessary ; and I think some evidence should be adduced on that head. Suppose a sale to be ordered, the next step is to make incumbrancers parties. (See sec. 27.) The court will use its own machinery for carrying the purposes of the act into effect, so far as possible consistently with the express directions of the act, of which the provisions are somewhat singular, and do not appear to have been necessary or to have effected any improvement in the practice so far as courts of equity are concerned. With regard to the mistake in the conveyance to the infant H. C. Foster, I do not see how it is to be rectified. A bill would be necessary, and it is difficult to understand how a mere volunteer could maintain such a bill. It is clear that no consent could be given for the infant Elizabeth Bowes. Probably some method may be discovered by which this lot may be secured for the infant H. C. Foster, in furtherance of the intention of the father. The only person to be considered is the infant Elizabeth Bowes, and her interests may be sufficiently protected.

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### BLAIN v. TERRYBERRY.

*Opening publication—Foreign commission.*

Where it was considered conducive to the ends of justice, publication was opened, and leave given to examine further witnesses, and to issue a foreign commission on payment of costs, and upon the terms of examining the witnesses in Canada, at the next examination term ; and the witnesses residing out of Canada, at the same term, or by foreign commission in the meantime ; if the latter, the commission to be returned and depositions disclosed two weeks before the examination term : it appearing not to be owing to the negligence of the party applying that the evidence had not been taken before.

This was an application by *Scott* for the plaintiff to open

publication after the examination of witnesses before the court at Hamilton.

The circumstances under which the application was made appear in the head-note and judgment.

*Wilson, contra.*

SPRAGGE, V. C.—I have read the affidavits upon which this application is founded, and the depositions taken, and upon the whole think that it will probably be conducive to the ends of justice that the application should be granted.

I think it was not through the negligence of the plaintiff that the witnesses, whose evidence it is now desired to take, were not examined at the same time as the other witnesses ; and, when the evidence was about to be taken, the plaintiff's counsel intimated that there were witnesses resident abroad whose attendance he had been unable to procure, and that he should apply for leave to examine them. The issue was upon the defendant Terryberry, and his counsel intimated no desire to postpone the examination of his witnesses, but preferred to proceed, and witnesses on both sides were examined, the learned counsel feeling probably, as I incline to think is the case, that he would not suffer any serious disadvantage from the disclosure of his evidence.

The application should be granted upon payment of the costs of this application, and of a counsel for attending examination of witnesses—which I fix at £3 10s.—and upon the terms of the witnesses residing in Canada being examined at the next examination term in Hamilton ; and the witnesses residing out of Canada being examined either at the same examination term, or by foreign commission in the meantime ; if by foreign commission, the commission to be returned and the depositions disclosed at least two weeks before the examination term. The commissioners to be appointed in the usual manner.

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#### MALLOCH v. PINHEY.

*Opening publication.*

The court refused to open publication in order to obtain evidence of an alleged conversation between a person mentioned in the pleadings and one of the defendants.

This was an application by *Strong*, to open publication, on

the grounds disclosed in the affidavit of the defendant Charles Hamnett Pinhey, setting forth, that since the examination of witnesses before the court in Ottawa, he had discovered that one Cuthbert, through whom plaintiff claimed title, had had a conversation with one of the defendants, the effect of which had a material bearing upon the points in issue, and tending to support the defence of the defendant.

*Fitzgerald*, contra.

VANKOUGHNET, C.—At the time of the application I thought the motion should be refused, but before finally disposing of it, have consulted my brother *Esten*, before whom the evidence in the cause was taken, and my interview with him has only confirmed me in my first opinion.

The defendants seek to open publication in order to prove a conversation between Cuthbert, who is named in the pleadings, and McVeigh one of the defendants. The attention of the defendants to Cuthbert's connexion with the premises is called expressly by a statement in the bill which alleges that Pinhey, the testator, with the consent of McVeigh, and as his agent, in 1842 or 1843, agreed to sell these premises to Cuthbert. Now surely it would have occurred to any one diligent in the maintenance of his supposed rights, to have taken the trouble to refer to Cuthbert, and enquire of him how this transaction occurred, and what parts respectively McVeigh and Pinhey took in it. The not doing so seems to me negligence, to counteract which publication should not be opened; a thing never lightly to be done, to let in evidence, which would not be conclusive, if of much effect at all upon the case. If the conversation occurred, and the admission made after the mortgage to the plaintiff was executed, it is very doubtful whether it could affect his position thereunder. If made before, it would be of little importance, as there was then no court of equity in which the defendant McVeigh could assert any right. The court never encourages applications of this nature; and under the circumstances stated, I think the motion must be refused with costs.

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## BERRIE v. MOORE.

*Endorsement on order nisi.*

A party neglecting to produce accounts before the master when so required, will be ordered to pay the costs occasioned by his contempt, although no commitment has taken place. The notice required by section 6, of General Order 46, not necessary in cases of orders *nisi* for non-production.

In this case the defendant Martin had failed to bring into the master's office certain accounts required from him, and thereupon an order *nisi* was granted against him, and a copy of this was served on his solicitors.

This copy was not endorsed as required by sec. 6 of Gen. Order 46.

On the expiration of the four days allowed by the order *nisi*, the order absolute for Martin's committal was issued, and a writ of attachment thereupon issued to the sheriff.

The plaintiff's solicitor learned that on the afternoon of the day on which the writ was issued, that Martin had filed his accounts, and wrote to Martin's solicitors that execution of the writ would be stayed on payment of the costs of the contempt already incurred.

The sheriff was also directed by the plaintiff's solicitors to stay execution of the writ for a time.

Martin's solicitor made no offer to pay the costs. Upon this state of facts *J. C. Hamilton* applied for an order on Martin to pay the plaintiff's costs of the contempt and of this application.

*S. H. Blake* opposed the motion, on the grounds that the plaintiff had waived the contempt by his stay of proceedings, and that the proceedings were irregular, the order *nisi* not having been endorsed as required by the orders.

SPRAGGE, V. C.—In *Taylor v. Bradburne*, my brother *Esten*, lately made an order similar to the one now applied for, and under the like circumstances.

With regard to the alleged irregularity in omitting to endorse the order with the notice required by sec. 6 of Gen. Order 46, I think such endorsement not necessary or proper. As I read the order, it is only to be made or endorsed on

orders described in sec. 2 of the same Gen. Order, and it is clear from the language of that section that it does not apply to orders *nisi*.

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### DICKENSON V. DUFFILL.

*Practice—Security for costs—Government officer.*

The mere fact of a plaintiff being in the service of the Crown, and absent from the jurisdiction of the court is not sufficient to exempt him from giving security for costs; to do so it must be shewn that he is absent from his domicile in the service of the Crown.

The plaintiff in this case was the Deputy-Inspector General of Canada, and as such, resident at Quebec, out of the jurisdiction of the court. The defendant *Hawkins*, before answering the bill, had obtained upon *præcipe* the usual order for security for costs, which the plaintiff moved to discharge on the ground that under the circumstances he was entitled to be exempted from giving such security.

*Hodgins*, in support of the application.

*Hawkins*, in person, *contra*. The cases cited appear in the judgment.

SPRAGGE, V. C.—The plaintiff seeks to take himself out of the general rule that a plaintiff residing out of the jurisdiction of the court must give security for costs. The plaintiff's residence is in Quebec, in Lower Canada, and he stands upon the same footing as to the courts of Upper Canada as a British subject residing in Scotland or Ireland does to the English Courts.

His ground of exemption is, that he is in the service of the Crown, being acting Deputy-Inspector-General, and is in the active discharge of his duties in that capacity, at the seat of Government, Quebec.

If the being in the service of the Crown were itself a ground of exemption, it may be that the plaintiff has established it, though I am not clear that the public duties in which the plaintiff is employed are of such a nature as to be a ground of exemption, but I think being in the service of

the Crown is not of itself sufficient. The case of *Chappell v. Watt* (2 L. T. N. S. 283) establishes this. The plaintiff seeking exemption must be absent from his domicile in the service of the Crown; not merely in the service of the Crown, and absent from the jurisdiction of the court in which he is suing. The plaintiff there was an officer serving with his regiment in Ireland, but inasmuch as it appeared that his domicile was in Ireland, he was held not exempt. The court held that the true ground of excuse was not, that an officer could not come over to conduct his own suit, but that by the command of a superior authority he is obliged to go out of the jurisdiction; and Mr. Justice *Crompton* states the rule thus: "The real rule is, is the plaintiff kept away from his English domicile by the order of the Crown?"

In the case of *Evelyn v. Chippendale*, (9 Sim. 497,) relied upon by the plaintiff in this case, the plaintiff, a half-pay lieutenant in the royal navy, held the offices of harbour master and captain of the port, in Barbadoes, where he had resided sixteen years; the former of these offices was in the gift of the House of Assembly, the latter in the gift of the Governor. And it was because he held the latter office, an office under Her Majesty, as the Vice-Chancellor put it, that he was held not compellable to give security for costs.

In a suit evidently between the same parties, though reported as *Evering v. Chiffenden*, (7 Dowl. 536,) a similar application in the Court of Queen's Bench was refused; *Patterson*, J., observing, "*Prima facie* when it is said that he is a resident abroad in the service of the Crown, it must be supposed that he is an Englishman. If then he is so, he is a resident abroad for a temporary purpose in the service of Her Majesty; and I do not see the difference between this case and that of *Lord Nugent v. Harcourt*. This is not the case of voluntary absence from the country, but the plaintiff is fulfilling a duty which I take is always performed by a naval officer." It was thus placed upon the ordinary footing of a plaintiff absent from his English domicile by the order of the Crown. The opinion of the Vice-Chancellor in 9 Simons is more brief; but I apprehend from what he did say that he went upon the same principle.

In *Lord Nugent v. Harcourt*, (2 Dowl. 578,) the principle is very clearly expressed : "In the case of an officer in the army, the absence is certainly involuntary. But I think if an Englishman is not permanently abroad, but is absent for temporary purposes in the service of His Majesty, he stands in the same situation as if he were compulsorily abroad, and therefore ought not to be compelled to find security for costs. If he had gone abroad for his own convenience merely, it would have been different."

The principle established by all these cases is, that to entitle a plaintiff to exemption from the ordinary rule, his domicile must be within the jurisdiction of the court in which he is bringing suit, and his absence from it must be occasioned (unless in the case of mere temporary absence, as for travelling) by his being engaged in the service of the Crown : it being assumed in the case of an Englishman that his domicile is in England ; and his absence being looked upon as temporary.

The plaintiff here does not shew that his domicile is within the jurisdiction of the court in which he is suing ; and I cannot agree with his counsel that there is any presumption that it is so. His name, it is urged, is English ; the presumption upon that would be that his domicile is in England ; assuming that he is not a foreigner, which I suppose should be assumed, as he is in the service of the Crown. There can be no legal presumption that his domicile is in Upper Canada, any more than in Nova Scotia or New Brunswick : all that can be said is, that it is more probable that it is either in Upper or Lower Canada, than in any other colony, or in England, from the nature of his appointment.

I desire to add, that I very much doubt whether such an appointment as the one in question, though in the name of the Crown, is of a nature that ought to exempt a plaintiff from giving security for costs. Suppose this plaintiff an Englishman, and suing in one of the courts in England, would his position be such that he could be regarded as having his domicile in England, but temporarily absent in the service of the Crown. An Englishman residing in India in the civil service of the East India Company has

been held to be domiciled in India. This appears from the case of *Arnold v. Arnold*, (2 M. & C. 256,) and other cases referred to in the *Attorney-General v. Napier*, (6 Ex. 217,) where the question of domicile was a good deal discussed. In the latter case the language of Mr. Baron *Parke* is, "If a natural born subject domiciled in England enters into Her Majesty's service, and goes abroad at the Queen's command, into foreign service, it is quite clear that his original domicile has not been parted with by him. He goes for a temporary purpose, and is supposed to be there for a time only, but not for the purpose of fixing his permanent abode abroad." This language appears to me wholly inapplicable to a person holding such an office as the plaintiff holds, and suing in an English court; even more inapplicable than to the case of an Englishman who holds an appointment in the civil service of the East India Company; at least in this, that a permanent abode would be much less probable in India than in Canada. There is of course the difference that the appointment of the plaintiff is under the Crown, but the force of that is only that it indicates temporary absence from England, a presumption that his original domicile there has not been parted with; a presumption that I think could scarcely be held good in the case of the plaintiff holding an appointment in Canada substantially under the Colonial Government. The case of an appointment in the civil service of the East India Company is in fact, though not in name, upon much the same footing.

But the plaintiff is not (as in the case supposed) bringing suit in England, but in Upper Canada, where, as I have said, there is, I think, no presumption in favour of his domicile.

Since the matter was first argued, it has been mentioned again, and a further affidavit from the plaintiff is produced. I do not think this affidavit is receivable, and did not mean to give leave to file it for use upon this application, a course which would be wholly irregular. I was asked not to give judgment until a further affidavit could be procured, and said I would abstain from giving judgment for the present, leaving it to the plaintiff to take his own course.

The question has, however, been further argued upon this

new affidavit, subject to [the objection to its reception. I do not think that it strengthens the plaintiff's case. He styles himself formerly a resident of Upper Canada. He says, "I resided in Upper Canada several years, say from the year 1833 until the removal of the seat of government to Lower Canada: that if I were not in the civil service of this province I would at this time, to the best of my belief, be residing permanently in Upper Canada." And he then mentions certain property which he owns in Upper Canada, but upon none of which does he appear to have resided.

I understand from this affidavit that Upper Canada was not the plaintiff's domicile of origin; but at most his acquired domicile; that he resided at Kingston from 1833 until the removal of the seat of government to Lower Canada. This first took place in 1843, I think. He does not inform us where he has been since. But I take it his affidavit means that he removed to Lower Canada with the government, in whose service he now is; if so, then for the last 18 years or thereabouts his residence has been wherever the seat of government might from time to time be. He intimates no intention of making Upper Canada again his domicile, and all that we can say about Upper Canada is, that at a certain period it was his acquired domicile, and would, as he believes, have continued so if he were not in the civil service. But being as he is in the civil service, Upper Canada has ceased to be, so far as his affidavit shews, his acquired domicile.

In proceeding upon the facts stated in the affidavit, I do not mean to say that it is admissible; it is clearly not so upon this application, filed as it is after argument; but the case of *Lillie v. Lillie* (2 M. & K. 404) would lead me to doubt whether the plaintiff is not bound by the description of residence in his bill, and cannot mend it by affidavit, for in that case the description in the affidavit was clearly sufficient to exempt the plaintiff from giving security for costs, but he was compelled to give security, because the description in the bill was not sufficient to exempt him.

The additional case to which I have been referred, *Clark v. Fergusson*, (5 Jur. N. S. 1155,) does not seem to throw any light upon the point. The plaintiff described himself

as of Longborough, near Galashiels, in Scotland, a lieutenant in Her Majesty's ship "Gladiator," now on service, and Sir *John Stuart* said, "the bill stated, though not perhaps with as much precision as might be wished, that the plaintiff was 'an officer in Her Majesty's ship Gladiator, now on service,' and that averment was substantially sufficient to exempt him from giving security for costs." I cannot suppose that Sir *John Stuart* meant to say, that an officer of a ship, not in service with his ship, was entitled to exemption; that would be at variance with the well settled rule; his reading of the allegation evidently was, that the plaintiff was on active service with his ship, and this is evident from his remarks as to the want of precision in his allegation in the bill; in any other view it was precise enough. It is immaterial whether Sir *John Stuart* was right in his reading of the allegation, that was a mere matter of construction; but he certainly did not mean to controvert the rule that the plaintiff must be absent on active service, or to question the case of *Lillie v. Lillie*, which was cited to him.

Upon the allegations in the bill, and upon the plaintiff's first affidavit, he proceeded upon the presumption that his domicile was in Upper Canada, a presumption for which I see no ground. The affidavit last filed does not proceed upon such presumption, but upon the fact of a former residence in Upper Canada, as a country of acquired domicile, and the continued ownership of property therein. But in either view there is an absence of that which forms in England the true ground of exemption, a temporary residence abroad from his domicile in the service of the Crown. The plaintiff does not establish either by presumption, or evidence of fact, that his domicile is now in Upper Canada.

I think it would be pushing the rule of exemption beyond its legitimate bounds to hold a person exempt from giving security for costs under the circumstances disclosed in this case; and would operate unfairly to defendants. I think the application should be refused with costs.

The plaintiff subsequently dismissed his bill, and filed a new one, stating certain facts to exempt him from being called upon to give security, whereupon

*Brough*, for the defendants, moved upon notice for an order that the plaintiff should pay the costs of the former suit, and give security for costs in the second cause, before they could be called upon to answer the bill, referring to *Spires v. Sewell*, (5 Sim. 193,) *Budge v. Budge*, (12 Beav. 385.)

*Scott*, contra.

**SPRAGGE, V. C.**—The defendants have not obtained an order for leave to read the affidavits used upon a like application in a former suit between the same parties ; and I think that without such order he is not entitled to read them. I must therefore dispose of this application upon the affidavits filed in support of, and in opposition to it ; together with the affidavit of the plaintiff filed in the former suit, which is read by the plaintiff, under an order obtained by him for that purpose.

The affidavit of defendant Hawkins in support of the application, states shortly “that the above named plaintiff to the best of my knowledge and belief, resides at the city of Quebec, in Lower Canada.” The plaintiff seeks to exempt himself from the ordinary rule, that a plaintiff residing out of the jurisdiction of the court, must give security for costs, by stating his position by affidavit as follows : “That I hold the office of Deputy-Inspector-General of the province of Canada, under and by virtue of an order of His Excellency the Governor-General in Council, dated the 7th day of April, A. D. 1855.

“That by virtue of the instructions of Her Majesty’s provincial government I am required at present to reside at the city of Quebec, in this province, such city being at present the seat of the executive government.

“That I am now, and have been, since my appointment as aforesaid, in active service as such acting Deputy-Inspector-General, in the civil service of the Crown, in this province.”

It is to be observed that the plaintiff’s affidavit is wholly silent upon the subject of domicile original or acquired.

He rests his right to exemption simply upon the ground that he holds a public appointment in the service of the Crown ; that he is in the active discharge of its duties, and that he is at present required to reside at Quebec, the seat of the executive government. I have no hesitation in saying that in my judgment this forms no ground for exemption. In disposing of the application in the former suit, I stated my view of the principle upon which exemption is allowed, to be, that the plaintiff seeking exemption must be absent from his domicile in the service of the Crown ; not merely in the service of the Crown, and absent from the jurisdiction of the court in which he is suing. It is the latter position only that the plaintiff shews here. The authorities to which I referred in my former judgment convince me that this is not enough. I must therefore grant the defendant's application.

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#### JACKSON v. JACKSON.

##### *Sequestration—Process against tenant—Costs.*

The tenant of a party against whom a writ of sequestration has issued, will be ordered to pay to the commissioner rent shewn to be due, and also to attorn and pay the accruing rents.

This was an interlocutory application in the case reported in the 8th volume of *Grant's Chancery Reports*, page 499. The defendant failing to pay the plaintiff certain sums due for alimony and costs, as directed by the decree pronounced in the cause, a writ of *fi. fa.* was issued against his goods.

The sheriff proceeded to seize certain goods on the defendant's farm, when they were claimed by one Blanchard, a son-in-law of the defendant, whereupon an interpleader issue was ordered between the plaintiff and Blanchard, and was tried before Sir *J. B. Robinson*, Bart., C. J., in April, 1860, and a verdict given in favour of the plaintiff, and the amounts then due were recovered.

From the evidence produced it appeared that one Jones had been a farm labourer of the defendant, and was present as a witness at the interpleader trial.

The defendant Jones, and Blanchard rode home together, and Blanchard then determined to leave the neighbourhood, and Jones took an assignment of a lease of defendant's farm, formerly made to Blanchard.

A further sum had become due from the defendant, and a writ of *fi. fa.* issued for its collection having been returned *nulla bona*, a writ of sequestration was placed in the sheriff's hands, of which due notice had been given to Jones.

A sum of fifteen pounds having by the terms of the lease become due since such notice was served.

*J. C. Hamilton*, for the plaintiff, applied for an order on the tenant requiring him to pay to the sheriff, as commissioner, the sum due for rent, and for an order requiring Jones to attorn to the sheriff, and pay all rent, in future accruing under the lease, so long as the sequestration continued in force.

The application was opposed by *Carroll* on behalf of Jones and the defendant, who produced affidavits by them to the effect that, on leasing the premises, Jones had paid in advance the half-year's rent now sought to be obtained.

Jones was cross-examined, and his knowledge of the transactions between Blanchard, the defendant, and plaintiff, was proved, and his statement as to payment of the rent in advance was made to appear incredible, or if such payment had been made, it was in fraud of the plaintiff.

It was also in evidence, that in conversations relative to the lease made shortly before this application, Jones had admitted that the £15 would become due as claimed by the plaintiff.

Smith's Chy. Prac. (1857) p. 123; Daniel's Prac. vol. 2, p. 821; Wilson v. Metcalfe, (1 Beav. 270.) And as to costs, McKay v. McKay, [(6 Gr. Chy. R. 389,) and Prentiss v. Brennan, (2 Gr. Chy. R. 582,) were referred to.

ESTEN, V. C., before whom the motion was made, after consideration, made the order as asked, and, under the circumstances, also directed that the defendant and Jones should be liable for the costs of the application.

## BANK OF MONTREAL v. KETCHUM.

*Held*, that under the orders of the 29th of June, 1861, a mortgagee is not entitled to an order for the delivery of possession as against the tenants of the mortgagor, although such tenancy may have begun after the mortgage was made.

This was an application by *McCarthy*, on behalf of the Bank of Montreal, for an order against the mortgagee and his tenants, to deliver up possession of the mortgaged premises after foreclosure.

*Blain*, for a tenant who held under a lease made before the mortgage, and the defendant.

*Foster*, on behalf of a tenant whose term commenced after the mortgage was given by the landlord *Ketchum*, objected that the order of the 29th of June does not apply to tenants, its terms referring to the mortgagor alone.

*SPRAGGE*, V. C., after consideration, refused to make any order against the tenants, and as to them discharged the application with costs.

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## FORBES v. ADAMSON.

*Mortgage—Decree for sale—Purchase by assignee of mortgagor—Deficiency.*

The owner of land, after creating a mortgage thereon, assigned his equity of redemption to a third party, who covenanted to pay off the mortgage debt, and afterwards became the purchaser of the mortgaged premises, under a decree at the suit of the mortgagee. At the sale the amount realised was not sufficient to cover the amount due to the mortgagee. *Held*, that under the circumstances he was not entitled to any lien on the estate for the deficiency.

The facts are stated in the judgment.

*Fitzgerald*, for the plaintiff, relied on *Otter v. Lord Vaux*, 2 K. & J. 650.

*Harrison*, contra.

**VANKOUGHNET**, C.—In this case *Forbes* being mortgagee, under a decree of this court procured a sale of the mortgaged premises, which was made accordingly, to one who had purchased the estate of the mortgagor in the lands, subject to the mortgage, but had before the sale under the

decree sold and conveyed away all his interest in the land to another party. The price at which the lands were sold under the decree is less than the amount due to Forbes on his mortgage. On settling the conveyance to be executed by Forbes to the purchaser, the former claims a right to reserve in it any claim he may have against the land or against the purchaser, on account of the balance of his mortgage money ; which he contends is, notwithstanding the sale, a lien or capable of being made a lien on the lands as against the purchaser by reason of his having purchased and once owned the estate, subject to the mortgage, and having thereby become liable to indemnify his vendor, the mortgagor, against any claim by the mortgagee in respect of that mortgage ; and it is argued, that inasmuch as the mortgagee can sue the mortgagor now for, and recover against him, the balance of the mortgage money, and the mortgagee will then have his remedy over against the purchaser from him, *ergo* the mortgagee can at once have the benefit of that remedy of the mortgagor by anticipation, and can have a lien on the land for it, and in support of this position *Otter v. Lord Vaux* is cited. I do not think that Forbes, the mortgagee, can on that decision sustain the pretension he makes here. In that case the mortgagor had executed two mortgages to different parties, and the first mortgagee having under a power of sale sold a portion of the mortgaged premises to the mortgagor for a less sum than the amount of the first mortgage, the latter claimed to hold them absolutely, and freed from the second mortgage of his own creation. The court held that he had done no more than he was bound to do when he got rid of the first mortgage, and thereby improved the security for the second mortgagee ; and that he stood in no other position than if he had paid off the first mortgage, or paid a portion of it, and obtained a release of the premises from it.

The plaintiff here, the mortgagee, has to make out three things before he can claim that the purchaser here stands in the same position as did the mortgagor to the second mortgagee in the case cited ; and they are

1st. That the first mortgagee in that case could have

claimed a lien on the land for the balance of his mortgage money after having agreed to sell, and sold the premises to the mortgagor for a certain sum absolutely.

2nd. That the plaintiff has any right to put the mortgagor in motion against his former vendee, the present purchaser, to indemnify him against the mortgagee's claim for the balance of his mortgage money.

3rd. That the mortgagor himself can by reason of his right to such indemnity claim a lien upon the premises which the mortgagee is about to convey.

I do not think that *Otter v. Vaux* will help the plaintiff over any of these difficulties. I see no privity whatever through the mortgagor or otherwise, between him and the purchaser arising out of the previous position of the latter as once purchaser and owner of the equity of redemption. The mortgagor may never choose to urge his claim to indemnity. There may be a good defence to it arising out of transactions between him and his vendee, which the plaintiff here would have no right to disturb, and it is new to me to hear that the plaintiff has a right to fall back upon the debtors of his debtor, or to set the latter in motion against them in order that he may thus secure funds wherewith to be paid. It is a process of garnishing which the plaintiff is not at present at all events entitled to avail himself of. I see no right, therefore, the plaintiff has to insist upon any reservation in the conveyance which he is called upon to execute.

The position and liability of a purchaser of an estate subject to a mortgage has been discussed in the following cases: *Forrester v. Leigh*, (Ambler, 171,) *Tweddell v. Tweddell*, 2. B. C. C. 101,) *Buller v. Buller*, (5 Ves. 534,) *Waring v. Ward*, (7 Ves. 332,) *Barhand v. Thanet*, (3 M. & K. 607.)

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## LEWIS v. JONES.

*Dismissing bill—Taking replication off the files.*

Where a plaintiff had filed an irregular replication, afterwards obtained by consent an order to amend the same, but did not do so, and a defendant moved to dismiss for want of prosecution, when the court treating the irregular replication as *no replication*, ordered a replication to be filed within two months, or bill should stand dismissed: at this time two of the defendants had not answered, and on the 12th of the month the replication was amended. Four days afterwards the plaintiff obtained an order *pro confesso* against the two defendants who had not answered; under these circumstances a motion to remove the replication from the files, and to dismiss the bill for want of prosecution, was granted with costs.

This was a motion by *S. Blake*, for defendant Jones, to remove the replication in this cause from off the files of the court, and dismiss the bill for want of prosecution, under the circumstances stated in the head-note and judgment, citing *Johnson v. Tucker*, 15 Sim. 599.

*Hodgins, contra.*

*ESTEN, V. C.*—I think the defendant *E. C. Jones* is entitled to every branch of this application. My brother *Spragge* evidently considered the replication as *no replication*, because he ordered the replication to be filed within two months. That replication did not in terms embrace all the defendants, and was bad on the face of it; the present replication in terms embraces all the defendants, but as to six, or at all events two of them, it was wholly irregular, they not having answered, and the bill not having been taken *pro confesso*. A defendant under such circumstances is entitled to move to take the replication off the file, and strike the case out of the paper of causes. In addition to this it appears that on the authority of *Johnson v. Tucker*, the defendant is entitled to move the replication off the files on the ground of the neglect to serve notice of the filing. The case of *McDougall v. Bell* must be deemed, if contra, to be overruled by the course of practice. The defendant is also entitled to have the bill dismissed as against him, for want of prosecution, on the ground of non-compliance with the order of the 18th of October, 1862: that order directed the plaintiff to file a replication within two months, and in default that his bill should be dismissed. Conceding

that under this order the plaintiff could amend the replication already on the files so as to make it a proper one, yet he has not done so. It is wholly irregular. Now he cannot surely put any thing he pleases on the files and call it a replication, and compel the defendant to move to take it off the files. At all events the defendant could under such circumstances move *uno flatu* to take the replication off the files and dismiss the bill, and this he has done. If I was satisfied the defendant had with full knowledge delayed for several weeks to make any objection, and permitted the plaintiff to set down the cause, I should probably decline to interfere, but there is no evidence that the defendant knew of the amendment of this replication until the notice of examination and hearing. A certificate was relied upon as shewing such notice on the 16th of December, 1862, but on inspection it proves to be a certificate of the non-production of papers. I think the application should be granted with costs.

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### HILL v. RUTHERFORD.

*Enrolling decree—Paying out money pending.*

A sum of money having been paid into court by the defendant, instead of being paid to plaintiff as directed by a decree of the court: upon depositing which proceedings against the defendant were staid, he having signified his intention of appealing from this decree; the plaintiff moved to have this money paid out to him pending the appeal. The defendant upon the motion undertook to enroll the decree at once if plaintiff would consent, and to urge on the appeal to a hearing; the court refused the application, but without costs; and on the application of the defendant the deposit on the re-hearing was retained in court for two weeks, to enable the defendant to proceed with the appeal.

Upon the re-hearing of this cause the decree was affirmed as reported in 9 Grant, 207, and the amount due had, on the application of the defendant, been paid into court, instead of being paid to the plaintiff, the defendant intending to carry the cause up to the Court of Error and Appeal. A motion was made on behalf of plaintiff to have this money paid out to him. Against the application *Fitzgerald* shewed cause, and offered to enroll the decree and carry up the appeal at once if plaintiff would consent; at the same time asked that the deposit on re-hearing might not be paid out to the plaintiff.

ESTEN, V. C.—I think the motion for payment of the £350 should be refused without costs, the motion for staying the payment of the deposit should be granted upon terms. The decree may be enrolled by consent even if it cannot be enrolled without consent. The plaintiff of course does not wish to delay the appeal. Let the decree therefore be enrolled at once, the plaintiff waiving all objections, if any, and payment of the deposit be stayed for a fortnight. I give no costs of this application. The defendant must undertake to prosecute his appeal, and liberty must be given to apply.

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#### COTTON v. CAMERON.

*Dismissing bill—Undertaking to answer.*

A solicitor undertook to put in an answer, which was not insisted upon, and the solicitor for the plaintiff undertook to go down to examination, but failed to do so ; a motion made by this defendant to dismiss was refused, but, under the circumstances, without costs.

This was an application for an order to dismiss for want of prosecution, by *H. Murray*, on behalf of defendant Lee, against which

*Hodgins* shewed cause.

ESTEN, V. C.—I think the motion must be refused. It is sworn that Mr. *Boulton* was solicitor for Mr. Lee, and as such promised to answer, and dispensed with service ; this fact not being disputed, Lee is bound to answer, and the bill might be taken *pro confesso* against him. It is clear that Mr. *Murray* is his solicitor, as he undertook to put in an answer for him, provided it were accepted without oath or signature. Then Lee is bound to answer, and Mr. *Murray* is his solicitor. The undertaking of Mr. *Hodgins*' clerk to go down to examination may be a reason for setting down the cause, but affords no ground for dismissing the bill. It does not appear that Mr. *Murray* was aware of Mr. *Boulton*'s undertaking. No costs.

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## WINTER v. HAMBURGH.

*Order to elect.*

Defendants sued at law and in this court for the same matters are entitled, on filing their answer, to obtain an order against plaintiff to elect, on *præcipe*, and it is not necessary that all the defendants should apply for such order.

The motion to discharge such order should be made in Chambers; if made in court it will be refused or referred to Chambers, and the costs of the day given to the defendants. The court in its discretion will allow both suits to proceed only when the proceedings at law are ancillary to those in equity.

It is not necessary that such order should be obtained by all the defendants.

The plaintiffs' original bill, filed in 1860, set out that the owner of real estate in 1822, conveyed certain premises in the county of Halton to the wife of the defendant Hamburg, in trust for one Emma Winter, then a minor, and who afterwards became the wife of the plaintiff Jacob Winter, and by whom he had several children, his co-plaintiffs, she having died shortly before the bill was filed.

The bill further alleged that shortly after his wife became of age, and on the eve of her marriage with Jacob Winter, she was prevailed on by Mrs. Hamburg and her husband to convey her estate to them.

This conveyance was alleged to have been obtained by undue influence, and to have been a fraud on the marital rights of Jacob Winter, and the bill claimed to have it rescinded, and the premises declared to belong to the plaintiffs as the representatives of Emma.

The defendants were F. Hamburg, (his wife being now dead,) and others claiming under Hamburg and his wife.

In July, 1862, the plaintiffs' solicitor, having for the first time seen the conveyance of 1822, which had not been registered, was of opinion that by reason of some defects it was ineffectual to pass any estate, and thereupon he obtained a new conveyance from the grantor to the plaintiffs.

On application to his Honour Vice-Chancellor *Esten*, the plaintiffs were allowed to amend their bill by setting up this second conveyance, his honour at that time remarking that for reasons similar to those set forth in the judgment, such amendment could not aid the case of the plaintiffs.

Immediately on obtaining the second conveyance the

plaintiffs brought an action of ejectment against the defendants and others, tenants of the premises, claiming title under the deed obtained in July, 1862.

The defendants, Francis and Henry Hamburgh, defended the common law suit, and also filed their answer to the amended bill, denying the plaintiffs' title, and the fraud with which they were charged, and alleging among other grounds of defence, that the plaintiffs were prosecuting both suits for the same cause, and they thereupon obtained the common order to elect, which was served upon the plaintiffs' solicitor.

The plaintiffs moved upon notice to discharge this order, which was returnable *before the court*; this being objected to on the ground that such an application was properly a Chambers motion, the consideration was accordingly adjourned into Chambers.

*O'Reilly*, Q. C., and *Foster*, for the plaintiffs, contended, that as the common law action had been already tried and a verdict given against the plaintiffs with liberty to move, that for this reason, and because plaintiffs were infants, and the action at law would in fact aid the judgment of this court, the order should be rescinded, or plaintiffs at least should be permitted to take the judgment of the court in banc, and cited *Tremliston v. Kemmiss* (1 *Ll. & G. Tem. Sug.* 29.)

*J. C. Hamilton*, contra. The court will usually on motion to discharge an order to elect refer it to the master to ascertain whether the suits are for the same matter, unless their objects are quite opposite.—*Hagne v. Curtis* (1 *Jac. & Walk.* 449.)

In the present case the relief sought in both suits is clearly the same—all the plaintiffs are entitled to can certainly be obtained in this court, and the defendants should not be harrassed with the defence of two suits. As the relief sought at law is not for the purpose merely of assisting in this suit, but for obtaining possession of the land claimed by the bill, the court will not allow both suits to proceed at the same time.—*Royle v. Wynne*, (5 *Jur.* 1002, S. C. 1 *Cr. & Ph.* 252,) *Mills v. Fry*, (3 *V. & B.* 9,) *Hollier v. Hedges*, (9 *Ir.*

Eq. R. 37,) Bullen v. Butcher, (558 Dick.,) Young v. Lucas, (1 V. & B. 381,) Cocknell v. Chalmely, 1 Russ. & My. 418,) Carrick v. Young, (4 Madd. 437,) and Madd. Ch. Pr. vol. 2, p. 462, were also referred to.

SPRAGGE, V. C.—The plaintiffs by their bill as amended are proceeding upon inconsistent titles.

The amendment (I agree with my brother *Esten*, who granted it) seems futile. If the conveyance of 1822 was operative, the conveyance of 1862 introduced by amendment is a mere nullity. If not operative, the plaintiffs had no *locus standi* in this court when they filed their bill, and moreover they would stand now in this court upon a mere legal title, and the same title upon which they are proceeding at law.

It is clear that the proceedings at law and in this court are in respect of the same subject matter.

The circumstance of the plaintiffs being unable to obtain at law the full remedy that they can obtain in this court does not entitle them to proceed in both.—Royle v. Wynne, on appeal from the Vice-Chancellor. Neither does the circumstance that the plaintiffs are uncertain as to their title; that was also the case in Royle v. Wynne. It was a question whether the estates passed under a residuary devise; if they did the plaintiff's remedy was in equity; if they did not, the remedy was at law. He sued both at law and in equity, and was compelled to elect.

Cocknell v. Chalmely is an authority for the same position.

The plaintiff is in fact in such cases proceeding upon inconsistent titles, as they are doing in this case apart from the amendments.

The plaintiffs' position seems to be shortly this: they are suing at law and in equity for the same subject matter, and apart from the amendments, upon inconsistent and contradictory titles; and with the amendments upon the same titles as are insisted upon at law.

This appears to me therefore to be clearly a case in which the plaintiffs cannot be allowed to proceed at law and in this court at the same time. If it were open to me to exercise a

discretion, I should be disposed, I think, to allow the plaintiffs to proceed at law to judgment restraining execution, and staying proceedings in this court in the meantime. But the court can only exercise its discretion when the proceedings at law are ancillary to those in equity. This is not the case here. Lord *Cottenham* was explicit upon this point in *Royle v. Wynne*, a case which in several respects very nearly resembles this.

*Tremiston v. Kemmiss* is an authority the other way. It is difficult to distinguish it from *Royle v. Wynne*, but the latter case was decided after *Tremiston v. Kemmiss*, and by the Lord Chancellor of England, and I am bound to follow it. Lord *Cottenham*, too, decided upon an appeal and repudiated the having such discretion as had been claimed by the Lord Chancellor of Ireland—a discretion which I gather from his language he would have exercised if, in his judgment, he possessed it.

My conclusion is, that the defendants are entitled to retain their order to elect, and that the plaintiffs' application must be refused with costs.

I do not think there is any thing in the objection that the order to elect was taken out by some, not by all, of the defendants.

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#### SIMPSON v. THE OTTAWA AND PRESCOTT RAILWAY COMPANY.

##### *Duty of receiver of a railway company.*

Where the receiver of a railway company was appointed to receive "the rents, issues and profits of the railway," held, that it was his duty to receive the gross receipts of the company for the carriage of passengers, freight, mails, &c., and to pay the bills for running expenses thereout, and not to receive only the surplus after paying the expenses.

The order for the receiver's appointment should direct the payment to him of the tolls and profits arising from the railway.

This was an application for an order on the defendants to pay over to the receiver, who had been appointed in the cause, all moneys derived from the earnings of the railway. The motion was resisted on the ground that all the company was bound to pay over to the plaintiff was the balance of such earnings after deducting the necessary expenses of working the road.

*Read, Q. C.*, for the plaintiffs.

*McDonald*, contra.

SPRAGGE, V. C.—The receiver is appointed under the order of the Court of Appeal, and is a “Receiver of the rents, issues, and profits of the railway.” The application which I have to dispose of involves the question whether the receiver is entitled to receive, and it is his duty to receive, the gross receipts of the company for the earnings of passengers, freight, the mails, and the like, or only the surplus that may remain after paying the expenses of the company.

It is urged on behalf of the company, that although receivers have been appointed, by the court, of dock companies’ tolls, canal companies’ tolls, and market fees; that there is yet but one instance of the appointment of a receiver to a railway company. That *Fripp v. The Chard Railway Company*, (17 Jur. 557,) was the case of a canal company, which is correct, and that in the one instance of such an appointment to a railway company, *Russell v. The Great Anglian Railway Company*, (3 McN. & G. 125,) it was uncontested, and was in fact a mode agreed upon between the company and a favoured creditor of giving the latter preference, and that also appears correct. But there is the case of *Furness v. The Caterham Railway Company*, (32 L. J. Reports, 170,) in which Sir *John Romilly* appointed a receiver to a railway company.

I understood Mr. *McDonald* to argue from the supposed circumstance of there being no case of the appointment of a receiver to a railway company, not that no receiver can properly be appointed, for that point is concluded by the order for the appointment of one in this case, but that the business of railway companies is essentially different from that of canal companies, dock companies, and the like; and that the duties of a receiver must consequently be different. That in the case of canal and dock companies the expenses of conducting the business are comparatively small, and the business itself much less complicated, consisting in little more than in receiving and keeping the works in repair, and paying the servants of the company, while railway companies

are their own carriers, involving a great variety of business and of expenditure ; and it was contended that the business of a railway company could not be carried on if a receiver had to be applied to for all the moneys necessary for these various purposes.

I agree that where the court cannot interpose usefully it should not interfere at all, and that it should interfere only so far as it can interfere usefully. I think, therefore, that if the payment into the hands of the receiver of the gross receipts of the company be incompatible with the working of the company, then he should be restricted to the receipt of the surplus, after payment of the necessary expenses of the company. But unless this be shown, and shown clearly, I think that the gross receipts should be paid to the receiver. This is the usual course in other cases. It affords, no doubt, to the creditors a better security, that all that is available shall reach his hands, than if a surplus, to be ascertained by the company's own officers, were to be paid over. In fact, if that were the only duty of the receiver, that is, to receive the surplus and pay it over, *cui bono* appoint him at all ; the creditor would probably derive as much benefit from an order on the company to pay into court from time to time the balance in hand, to be verified by affidavit.

The argument to be drawn from the circumstance of there being no case in England of the appointment by the Court of Chancery of a receiver to a railway company, if there had been no such case, is much weakened by another circumstance—that of the facility with which receivers may be appointed by justices, at the instance of mortgagees. They may be appointed to receive the whole or a competent part of the tolls or sums liable to the payment of the interest, or principal and interest, as the case may be, and I am not informed whether the practice under the statute is to leave sufficient in the hands of the company for the estimated cost of working the road ; or to direct the receiver to receive the whole ; but it is clear the payment of the gross amount of tolls, &c., to the receiver may be ordered—a pretty plain indication of the opinion of the legislature that such a course is not incompatible with the working of a line of rail-

way. And in *Furness v. The Catheram Railway Company*, the appointment was of a “ receiver of the said railway, and of the tolls and profits arising therefrom.” This appears from a report of the case upon its coming before the Master of the Rolls (27 Beav. 358) in the following year. It would have been well if the same language had been adopted in the order made in this case. “ Rents, issues, and profits” are not so appropriate in the case of a railway, but must be taken to mean the same thing.

The *management* of the railway must remain in the hands in which the legislature has placed it—it is no part of the duty of the receiver to interfere with it. The respective duties of the governing body of the company on the one hand, and of the receiver on the other, are well defined in the case of *Ames v. The Trustees of the Birkenhead Docks*, (20 Beav. 350.) The person appointed in that case was the chairman of the trustees, and he was appointed “ Receiver of the rates and tolls, and of the rents of the property of the corporation, without salary, and without giving security.” *Sir John Romilly* said, “ I am of opinion that he is the receiver of the mortgagees, and that he has under the order of this court removed the trustees from the possession and receipt of the rates, tolls, and rents. I dissent from the argument which suggests that in that event the powers of the act vested in the trustees are superseded, and that it has thereby become impossible so long as this continues for the undertaking to be lawfully carried on. What the receiver takes are the rates, tolls, and rents. Out of the moneys so received by him he pays the expenses of the undertaking, and the interest of the mortgagees, and the balance into court. The undertaking continues to be managed by the trustees; they enter into contracts, they engage and dismiss workmen and servants, they do all the matters which are entrusted to them by these statutes. The expenses they incur in so doing are paid by the receiver, who in that character has nothing to do with the management. He simply pays the bills and moneys with the trustees require him to do, subject to account hereafter, if any thing improper should take place in relation to such payment.”

Now I see nothing in all this at all incompatible with the due and efficient working and management of the railway by the president and directors of the company. So far as the application asks for more than this I must refuse it, but the company has been wrong, in my judgment, in refusing to pay over to the receiver any thing but the surplus of its receipts after retaining their expenses.

I think it is the right and duty of the receiver to watch the expenses of the company, to remonstrate with its officers and servants when, in his judgment, they are needless or excessive; and when due attention is not paid to his representations to present the matter to this court; and this more especially if any case should come under his observation of expenses incurred otherwise than in good faith. He will of course have a right to the fullest information as well from inspection of the books as otherwise. I think all this necessarily flows from the nature of his duties. He is called on to pay out moneys as for expenses properly and necessarily incurred, and he should to a reasonable extent see that they are such. I apprehend little or no practical difficulty in carrying this out.

I am not in a position at present to say what will be a proper remuneration to the receiver. If by per centage I should know what amount of money will pass through his hands. Nor am I able to say how much of the receiver's time will be occupied in his duties. The duties certainly are important ones, and should be fairly compensated for, not extravagantly, but still with a reasonable degree of liberality.

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## RHODES v. NEILD.

*Production of documents—Affidavits.*

A plaintiff filed a bill against his assignee's representative for an account, charging that certain mortgages then in his possession, and apparently belonging to the assignee's estate, in reality were part of his estate. On being served with the usual order for production of documents, the plaintiff filed an affidavit, objecting to produce the mortgages, on the grounds that they were held by the assignee the plaintiff's trustee, and that he had a lien on them for moneys expended by him on account of the properties covered by them. The affidavit also described certain other documents in the plaintiff's possession generally. The answer denied, on information and belief, that the mortgages had ever been the property of the plaintiff.

Upon the application of the defendant, an order was granted requiring production of the mortgages, and for a more particular affidavit.

The plaintiff James Rhodes filed a bill against the defendant Thomas W. Neild, who is the administrator of his deceased brother Joseph Rhodes, setting forth an assignment of the plaintiff's property to Joseph Rhodes, in trust for the benefit of the assignor's creditors, praying for an account, and alleging that some mortgages which were in the plaintiff's possession, but in which his name did not appear, belonged either in whole or in part to his estate, and not to the estate of Joseph Rhodes, who appeared therein as a mortgagee. The answer of the administrator denied on information and belief that the plaintiff ever had any interest in the mortgages, and claimed that they were taken for the sole benefit of the parties who appeared as mortgagees therein.

Upon being served with the usual order for the production of documents, the plaintiff filed an affidavit, admitting the possession of the mortgages, but refusing to produce them, upon the alleged grounds that Joseph Rhodes' estate had no beneficial interest therein, and that he had held them as trustee for the plaintiff; that the plaintiff had at least a lien on them for money advanced on account of the lands comprised in them, and that third parties also were interested therein. He also described numerous documents in his possession generally as "a large number of letters from the said Joseph Rhodes in his life-time and others for him to me, and accounts furnished me of goods sent to Upper Canada for sale."

*McGregor*, on behalf of the defendant, moved for an order requiring the plaintiff to produce the mortgages, and to file a particular affidavit, properly describing the letters and accounts.

*Burns*, contra, resisted the application on the grounds stated in the bill, and in an affidavit of the plaintiff.

**SPRAGGE, V. C.**—Upon the plaintiff's own shewing the defendant is entitled to production of the mortgages in question. They are two mortgages made by a person named McElderry, one of them to Joseph Rhodes and others. Taking it to be true, as stated by the plaintiff, that McElderry was the plaintiff's debtor, and that the mortgages were taken by Joseph Rhodes as agent and trustee for the plaintiff, to secure debts due to the plaintiff, upon what ground does the plaintiff seek to protect them from production? It is the plaintiff's case that they relate to the matters in question; he does not shew that they relate exclusively to the plaintiff's title, and would not aid the defence. They are in his possession, and he does not say how they came to be so, but in his first affidavit he says he is interested in them in manner set out in the bill, and has at least a lien upon them for a large sum of money, the balance, as I should infer, which he claims upon account between him and his agent Joseph Rhodes. In his further affidavit he claims to have a lien upon them for moneys paid and advanced on the properties therein mentioned, paid and advanced; to whom he does not say; if to McElderry it is beside the question, and if to Joseph Rhodes, it is not in accordance with the bill, and there are not such facts shewn as could make out the plaintiff to be an equitable mortgagee of these mortgages. In fact, from the whole tenor of the bill, it is clear that he occupied no such position. Such position would be inconsistent with the relative position of the parties, so the plaintiff brings himself within no rule of protection.

Any doubt that I have as to the production arises from the allegation in the answer, that the mortgages were taken for debts due to Joseph Rhodes himself, and that the plaintiff never had any interest in them, in which case they have

nothing to do with the matters in question in this suit, but the answer is as to belief only, and is by a personal representative. I think I may properly say to the plaintiff that, according to the case he himself makes, in regard to the mortgages he is bound to produce them.

The affidavit is also too general in regard to letters, accounts, memoranda, and other papers therein referred to.

The order must be made for a better affidavit, and with costs.

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### HARKIN v. RABIDON.

*Attachment for costs—Liability of sheriff for an escape—Measure of damages.*

Costs were ordered to be paid, and in default attachment issued, (prior to 22 Vic., ch. 33,) under which the sheriff arrested the defendant, and accepted bail to the limits, from which he escaped.

*Held*, that the sheriff was personally liable for the damage occasioned thereby, to be measured by the value of the custody.

*Held*, also, that issuing a *f. fa.* for these costs had not waived the right of plaintiff to apply against the sheriff.

The plaintiff obtained a decree in this cause, with costs, against the defendants, as is reported in Grant's Ch. Rep., vol. vii., p. 243.

The defendant Rabidon, being served with this decree, made default in the delivery and execution of deeds, as directed thereby, and also in payment of the costs taxed, and an attachment issued in the month of June, 1858, directed to the sheriff of Essex.

The sheriff, soon after, made his return of *cepi corpus*. In the month of October following the plaintiffs learned that the sheriff had taken bail to the limits; that the defendant had escaped, and had removed to the state of Michigan; thereupon, the plaintiffs' solicitors wrote to the sheriff, expressing their dissatisfaction with this step, and explaining the reasons on which they objected, and especially because the defendant had been ordered to deliver up and execute deeds, as well as pay the costs, which had not yet been complied with.

After this, a writ of sequestration and a writ of *f. fa.* goods issued, upon which the sheriff made a portion of the costs, leaving £35 8s. 3d. due.

The plaintiffs then applied on notice, supported by affida-

vits, for an order to compel the sheriff to pay this sum, and the costs of the application, alleging that he had, without the authority of the court, or consent of the plaintiffs, permitted the escape. The other material facts are stated in the judgment.

*J. C. Hamilton*, for the plaintiffs, cited *Solly v. Greathead*, 11 Vesey 170; *Brown v. Paxton*, 19 U. C. Q. B. 426;\* *Collard v. Hare*, 5 Sim. 10; *Beames on Costs*, 352; *Smith's Chancery Practice*, edition of 1857, p. 118, and *Daniel's Chancery Practice*, p. 325.

*Douglas*, contra, contended that this court will now view with more leniency than formerly such unintentional breaches of duty. The sheriff is shewn by the evidence to have acted under the advice of counsel, and with the conviction that he had fulfilled his duty when he had taken bail, which he is now ready to assign to the plaintiffs. He contended that at law the plaintiffs would be entitled to claim from the sheriff only so much of the amount due as they can prove the defendant's custody to have been worth at the time of his escape; that action on the case, not action of debt, would lie at common law. He cited *Morris v. Hayward*, 6 Taunton, 569; *Kerr v. Fullarton*, 10 U. C. C. P. 250;† *Calcutt v. Ruttan*, 13 U. C. Q. B. 220; *Imperial Act*, 5 & 6 Vic., ch. 98, sec. 98, and 20 Vic., ch. 57.

**ESTEN, V. C.**—This is an application to make the sheriff of the county of Essex pay the sum of about thirty-five pounds costs, directed by the decree of this court to be paid by the defendants to the plaintiffs. The grounds of the application are, that the sheriff permitted the defendant Rabidon, after he had been arrested under an attachment for disobedience to the decree to be at large. The decree directed the defendant Rabidon to execute a conveyance of the lands in question to the plaintiffs and both defendants to pay the costs of the suit. This decree not having been obeyed an attachment issued, under which the defendant Rabidon

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\* Afterwards reversed on appeal.

† Affirmed on appeal.

was arrested. This occurred in July, 1858. In October of the same year, the plaintiffs' solicitor having heard that the defendant Rabidon was at large, a correspondence ensued between them and the sheriff on the subject, which, leading to no satisfactory result, a sequestration was issued in August, 1859, and in November of the same year, the act of Parliament abolishing arrest for non-payment of money, and costs having in the meantime passed, a *fi. fa.* was issued, under which a sum of about six pounds was levied and paid to the plaintiffs; and this application is made to compel the sheriff to pay the balance of the costs. The defendant Rabidon had in the meantime absconded to the United States, and the defendant Thibodo has resided there ever since the commencement of the suit.

It is quite clear that an attachment for non-payment of costs was not bailable, and that the sheriff was wrong in permitting the defendant Rabidon to be at large. The questions are whether any liability he may have incurred in consequence of acting in this manner has been affected by the act of parliament to which reference has been made, or by the conduct of the plaintiffs in issuing first a sequestration and then a *fi. fa.* for the purpose of levying the costs. I think the act of parliament had no effect on the liability of the sheriff. From the time that it passed no doubt the defendant Rabidon was entitled to his liberty, and it would have been unlawful to have detained him in custody so far as the costs were concerned. But if the sheriff had rendered himself liable previously to the payment of the costs, I do not think the act of parliament affected this liability. Then did the plaintiffs waive their claim upon the sheriff by continuing the process of contempt against the defendant Rabidon, and afterwards issuing a writ of *fi. fa.* under the act. I cannot see that any such effect follows. It was natural and proper that they should employ all means of obtaining the costs from the defendant Rabidon before they resorted to the sheriff's liability, and it would, I think, be unreasonable to hold that such resort operated as a waiver of that liability. It would be injurious to sheriffs themselves to establish the contrary doctrine. If it should

be considered that proceedings for the recovery of the costs against the defendant himself operated as a waiver of the claim against the sheriff, no plaintiff could venture to take the least step for that purpose, but must always proceed against the sheriff in the first instance, although the defendant might have goods or lands from which the costs could be levied. According to the best judgment I can form I do not think any waiver has occurred in the present case. The gentlemen who attended to this matter on either side argued it extremely well, and did themselves great credit, but I should have been glad to have had the assistance of practitioners of more experience in this, which is a matter of some nicety. So far as I have been able to gather the law from the adjudged cases, it appears that the remedy at common law for an escape was an action on the case in which damages were recoverable, proportionate to the injury sustained. Acts of parliament were however passed, which gave an action of debt in such cases, in which action the whole amount of the debt was recoverable. It was in this state of the law that some cases were decided in courts of equity, in which the sheriff was ordered to pay the whole amount claimed against the prisoner, whom he had suffered to be at large, and it is said that these orders were founded on the fact of the whole amount being recoverable at law.

Then came the 5th and 6th Victoria, chapter 98, which provided that in cases of escape the common law remedy of an action on the case should be resorted to; and in consequence of this enactment, damages proportionate to the injury actually sustained can alone be recovered in England, in case of an escape. Although this statute does not apply to courts of equity, their practice in this respect is controlled by it, and the rule in equity as well as at law in England now is, that in case of an escape the sheriff shall be liable only to the extent of the injury actually sustained. I do not know what the rule in this country in this respect is, but whatever it is, it will regulate the order that I shall make in the case, that is, I shall either make an order for the payment of the whole sum demanded, or direct an enquiry, for the purpose of ascertaining the extent of the

damages actually sustained by the escape of the defendant, according as the rule is one way or the other. It is quite clear, I think, that up to the passing of the late act the sheriff was liable to this claim. I am not aware that any other enactment affects this liability. It is impossible, I think, that this one should have such effect. The present application might have been made at any time after the escape, and before the passing of the act in question; and the sheriff cannot complain that in ease of him the plaintiffs have borne to exercise their strict rights, with a view to recover the amount demanded, if possible, from the defendant himself. It would be very unjust that such should be the case. Had the defendant been detained in custody, he might have paid the costs before the passing of the act. The plaintiffs had a right to the custody of the body during every hour, until the demand was paid. The sheriff was liable the moment he liberated the defendant, and the legislature could not have intended that this act should affect any liability already incurred.

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The question as to the measure of the sheriff's liability was afterwards spoken to by *Hector*, Q. C., for the plaintiffs, and by *Prince*, for the sheriff, whereupon his honour decided that this was to be equal to the value of the custody of the defendant when the escape was permitted; and it was referred to the master to ascertain this. The sheriff to pay such sum, and the costs of this application.

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The case was afterwards heard before the three judges, by way of appeal, when the decision of his honour was affirmed.

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## MCLEAN V. BEATTY.

*Garnishee order—Payment under, of costs coming to solicitor of debtor.*

An award for an amount together with costs having been made in favour of a party, the costs were taxed by consent and the amount promised to be paid to the solicitor of the party ordered to receive such costs. A garnishee order was subsequently obtained by a third party, under which the amount awarded and the costs were paid over to such third party, with notice, however, of the solicitor's lien for the costs. Under these circumstances a motion made to stay proceedings to enforce payment of the costs under the award at the instance of the solicitor to whom they were payable was refused with costs.

The facts appear sufficiently in the head note and judgment.

*G. D. Boulton* for the defendant, who applies.

*S. Blake* contra.

**VANKOUGHNET, C.**—So long back as October, 1862, the costs payable to the plaintiff under the award made by Mr. Roaf in this case were taxed by Mr. Blake by consent, and their payment to the plaintiff's solicitors was repeatedly promised.

On the 7th of April following a garnishee order was obtained from the County Court, whereby the defendants were ordered to pay to one Strachan a judgment creditor of the plaintiff the debt due from them to the plaintiff. Under this order doubtless the amount awarded to the plaintiff was attached, but the defendants not only paid this sum to Strachan, but with full knowledge of the lien of the plaintiff's solicitors, and in breach of the previous promises made to them, but also paid to Strachan the amount of the costs as taxed by Mr. Blake. The plaintiff's solicitor discovering this caused the costs to be regularly taxed by the master of this court and issued execution therefor. Previously, and on the 6th of May, the judge of the County Court amended his order of the 7th of April, which was general, by confining the sum payable under it to the amount stated in Mr. Roaf's award as the debt due to the plaintiff. The defendants contend that they paid in obedience to the order of the 7th of April, and in good faith,

and that the execution against them should be discharged. I think not. They should have paid the costs as promised even prior to the 7th of April, and they should have resisted the making of such an order if they supposed it covered the costs, or not paid the costs under it, and if an attempt was made to compel them to do so, have applied to this court. If Strachan received the costs with notice of the solicitors' lien, he could be compelled to re-pay. As it is the defendants must pay over again, and this application be discharged with costs. His lordship referred to *Sympson v. Prothero*, 3 Jur. N. S. 711; *Eisdell v. Coningham*, 28 L. J. Ex. 213; *Cooper v. Brayne*, 27 L. J. Ex. 446; *Hough v. Edwards*, 26 L. J. Ex. 54; *Barker v. St. Quintin*, 12 M. & W. 441.

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#### FARRELL v. MOORE.

*Title—Deed executed by attorney.*

A prior deed through which the title comes to the vendor having been executed by the attorney of the grantor, does not render the title invalid, or such a a purchaser will not be bound to accept.

On settling a conveyance directed by a decree of the court, an objection was raised to the title on the ground that one of the conveyances forming a link in the title to the vendor had been executed under a power of attorney given by the grantor in such deed, and not by himself in person, and *Mitchell v. Neale* (2 Ves. Sr. 678) was cited in support of the objection.

**VANKOUGHNET, C.**—This is a reference as to title, the question being whether the defendant is bound to accept it, inasmuch as one of the conveyances, which evidence it, is executed under a power of attorney. The rule is very generally stated in the text books to be that a purchaser is not bound to accept a conveyance executed by attorney, and for this the case of *Mitchell v. Neale* is relied upon. The reasons given by Lord *Hardwicke* in that case for requiring the execution of the deed by the vendor himself, proceed rather upon the grounds of convenience and of the ability

of the vendor without unreasonable trouble or expense to execute the conveyance himself; and so he should in all cases where he possibly can. Here, however, the objection is not that the immediate vendor refuses to execute the conveyance himself, but that a prior deed through which the title comes to that vendor is executed by attorney. I cannot hold that, for this reason, the title is invalid, or such as a purchaser is not bound to accept. Difficulties of various kinds arise in the proof of title caused by death, by testacy and intestacy, requiring often a great variety of evidence, but that evidence being supplied and being satisfactory the difficulties are removed. So here, I cannot order the deed in question to be re-executed, but it being admitted that the power of attorney was duly executed, and that the deed was properly executed under it, I must hold that this link in the title is sufficiently established.

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### McDOWELL v. McDOWELL.

*Sequestration—When choses in action are bound by.*

**Held**, 1st. That a creditor has a right under a writ of sequestration to compel payment by a third party of a debt which he owes to the defendant, against whose estate the writ issues.

2nd. That until either the sequestrator or the party claiming under the writ take steps to obtain payment of the money, the chose in action is not bound by reason of the writ being in the sheriff's hands.

3rd. That writs of execution only bind moneys or choses in action, or rather securities for money, from the time of actual seizure by the sheriff or of some act symbolical therewith or tantamount thereto.

This was an application for an order on one Healay to pay to the plaintiff a sum of money due upon a mortgage made by Healay to the defendant, or in the alternative that the money might be paid into court. The circumstances giving rise to the motion are clearly stated in the judgment.

*S. H. Blake*, for the motion.

*Hodgins*, contra.

**VANKOUGHNET, C.**—In this case the plaintiff having issued a writ of sequestration which has been returned by the sheriff

unsatisfied, but with a special statement that one Healay had executed to the defendant a mortgage to secure payment of a sum of money now overdue, and which the mortgagor expresses his willingness to pay as the court may direct, applies for an order on the mortgagor to pay the money to the plaintiff or into court. Notice of the application has been served on the defendant, and on one Elizabeth Miller, the assignee from the defendant of the mortgage. The writ of sequestration was placed in the hands of the sheriff on the 31st day of January, 1862. The mortgage was assigned by the defendant to Mrs. Miller on or about the 12th day of December, 1862. The plaintiff rests the application on two grounds, 1st, that the agreement is fraudulent, and was made without consideration, and with the intent to defeat the plaintiff's claim, and 2nd, that it having been made after the writ of sequestration was lodged with the sheriff it is inoperative, as the mortgage was bound in the hands of the defendant by that writ. As to the first ground, I cannot, upon the evidence, say that the transaction between the defendant and Mrs. Miller was fraudulent, but, as I think it admits of further enquiry, I will order the payment into court of the money—the defendant being willing to make such payment—and leave it to Mrs. Miller to apply for it. There is no affidavit from herself as to the nature of the transaction by which she assumed the mortgage. The affidavits of her son and of the defendant do not state the amount of the consideration paid by her for it, though they state it was a valuable consideration. She is sworn to be the mother of the woman with whom the defendant, having deserted his wife, cohabits.

As to the second ground, I am of opinion that if the assignment be *bona fide*, it is not rendered ineffectual by reason of the writ being in the hands of the sheriff prior to, and at the time of the assignment. It is laid down very generally in text books that a chose in action is not a subject of sequestration, unless the third party, the debtor, consents to it, and *Johnson v. Chippindall*, 2 Sim. 55, is quoted as an authority for this position. If this be so, then at all events until the consent of the third party, the debtor,

was obtained, the writ could have no effect upon the debt owing by him, for it could not hold that which the sheriff could not seize, or which could not be realized under the writ, or by the order of the court; but if the creditor has a right under a writ of sequestration to compel the payment by a third party of a debt which he owes to the defendant, against whose estate the writ issues, as I think he has, in accordance with the decision of the Master of the Rolls in *Wilson v. Metcalfe*, (1 Beavan 262,) it would not follow from that, that this debt was so bound by the writ from the time of its issue or delivery to the sheriff that the person to whom it may be payable could not transfer it *bona fide* to another party, or the debtor pay it and so free himself from further responsibility in respect to it. On the contrary, I think that until either the sequestrators or the party claiming under the writ take steps to obtain payment of the money, the chose in action is not bound. In *Wilson v. Metcalfe*, a Mrs. Brown owed the defendant, against whose estate a writ of sequestration had issued, a sum of £225 arrears of a rent charge; the money was lying in the bank ready to be paid over, and a copy of the writ of sequestration was served on Mrs. Brown, and a demand of the money made upon her: she did not dispute that she owed the amount. Subsequently the defendant against whom the writ had issued demanded payment, and threatened to distrain if it was not made to him. Mrs. Brown paid him over the money, and the court held she was justified in so doing, no order having been obtained upon her to pay it to the plaintiff, and nothing done to protect her if she had so paid it.

I have considered how far the statute which now permits the sheriff to seize choses in action under execution may give new rights under writs of sequestration, and in so doing, I have had necessarily to judge whether or not such choses in action are bound as goods and chattels in specie are, from the time of the delivery of the writ to the sheriff, or only from the time of actual seizure by the sheriff, or of some act symbolical therewith and tantamount thereto; and I am of opinion that writs of execution only bind moneys or choses in

action, or rather securities for money, from the latter period, and not from the time of the delivery of the writ to the sheriff. At common law, writs of execution bound goods and chattels from the teste of the writ. By the Statute of Frauds, 29 Charles II., this hardship was lessened by making them operative only from the time of the delivery to the sheriff, and now by the Imperial Statute, 19 & 20 Victoria, chapter 97, section 1, not in force here, the writs only have effect from and upon actual seizure. Money, or securities for money could not be seized at common law under a *f. fa.*, nor in this country until the 20th Victoria, chapter 57. By that statute the creditor in this respect received great and direct additional rights and advantages, and the debtor was subjected in a corresponding degree to a deprivation of property. A new subject of execution was created, and in looking at the language by which this was effected, we find it to be, "that the sheriff or other officer *having the execution* of any writ of *fieri facias* against goods sued out, &c., or of any precept made in pursuance thereof, shall seize any money or bank notes, &c., *belonging* to the person against whose effects the writ of *f. fa.* has issued. Now the natural meaning of this language is that the moneys or securities for money shall belong to the execution debtor at the time of seizure, for it is only such as *belong* to him that the sheriff can or shall seize. Property, goods, and chattels belong to the debtor after the delivery of the writ to the sheriff—even after seizure—and notwithstanding the writ they *cease* to belong to him if he has assigned them, though they may be subject to the writ in the hands of the assignee. The statute does not say that upon such property the writ of *f. fa.* shall operate in the same manner as it does upon goods and chattels; but it says that the sheriff " *having the execution* of any writ against goods *shall seize*, &c." We cannot strain this language to any larger meaning than it naturally imports. There is no principle governing the construction of statutes which warrants it, and there is no rule of the common law applicable to executions which requires it; and when we look at the consequences which would result from carrying the operation of the writ in such cases further back,

we cannot suppose for a moment that the legislature intended such a construction of the statute as would produce them. Take but one illustration : A. holds the promissory note of B. in Toronto : an execution issues against A., and is placed in the hands of the sheriff while he holds the note. A. subsequently discounts with a bank in Toronto, or to make the case stronger, with a bank in Hamilton the promissory note of B. If that promissory note was bound as the property of A. by the delivery of the writ to the sheriff, what property would the bank have acquired in it ? More full of hardships and embarrassments still might be the case of moneys paid away by or for the debtor after the delivery of the writ to the sheriff. No statute, where the legislative language is not too plain to admit of doubt, should be so construed as to work mischief to innocent parties, or to create embarrassment and difficulties in the every day transactions of life. The tendency of legislation in England has been to restrict the operation of writs of execution as to the time they are to take effect. The language of the other statutes of Upper Canada which subject for the first time certain other descriptions of property to execution, are variously worded. The 2nd William IV., chapter 6, section 1, provides that bank stock "may be taken and sold in execution *in the same manner* as other personal property of a debtor."

The statute 12 Victoria, chapter 73, which enacts that an equity of redemption in real estate may be sold, provides, "that the effect of such seizure, sale, and conveyance shall be to vest in the purchaser all the legal and equitable interest of the mortgagor therein at the time the writ was placed in the hands of the sheriff, as well as at the time of such sale." The 20 Victoria, chapter 3, section 11, subjecting equities of redemption in chattels to seizure and sale under execution, declares that "such sale shall convey whatever interest the mortgagor had in such chattels *at the time of the seizure*." The act under consideration is silent as to time ; but I think its obvious meaning is, and its practical use should only be, that which I have ascribed to it. The creditor must find out for the sheriff—the best way he can—where such property can be got at, and when got at by the sheriff, and only then, in

my judgment, is its use by the debtor restrained. There is no decision of any of the common law courts upon this question, and I have therefore to take upon myself to pronounce an opinion upon it. The result is, that the powers conferred by this statute in no way alter by analogy or otherwise the effect which before it a writ of sequestration had.

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### MACDONALD v. CARRODI.

*Interpleader costs—Payment of out of fund in court—Practice.*

Plaintiffs and defendants, being joint owners of a vessel, instituted a suit to have the partnership terminated. The vessel was sold under order of this court, and promissory notes were taken in part payment, and deposited with the registrar of the court. Subsequently these notes, being unpaid, were sued on in the name of the registrar, and execution obtained, under which the vessel was seized as the property of the makers. Being claimed by certain persons, the sheriff obtained an interpleader order between them and the execution plaintiff, but without the leave of the court being asked by the execution plaintiff therefor, or to the litigation at law: and the claimant succeeded in the interpleader issue.

On motion to have the costs of the issue paid out of the moneys in court, *Held*, that the sanction of the court should have been obtained to the contest at law if the parties meant to look to the fund in court for their costs; and that not having been obtained, applicant must make out a special case to get out of the funds those costs which were incurred at his own risk.

Under the circumstances the costs at law were ordered to be paid, but only between party and party; costs of the motion refused, as the parties acted irregularly, and might have avoided it by application to the court at the proper time for permission to litigate, and that the solicitor should not charge his client with any costs therein, as the motion rendered necessary by his fault or oversight: costs incurred against defendant at law subsequent to judgment in interpleader suit, to be paid by him or his solicitor.

This was a motion by *Read*, Q. C., for payment out of fund in court of certain costs incurred at law under the circumstances appearing in the head note and judgment.

*Crickmore*, for other parties.

**VANKOUGHNET, C.**—This is a motion to have the costs of an interpleader at law paid out of moneys in court, under the following circumstances. Several parties, the plaintiff and defendants, were co-partners in or owners of the steamer *Collingwood*, and this suit was instituted to have the partnership terminated, the vessel sold, accounts taken and debts

paid. The vessel was sold under the order of the court, and certain promissory notes were taken in part payment, and deposited with the registrar of the court. Having fallen due, they were put in suit in the name of the registrar, judgment obtained and execution issued, under which was seized the same vessel as the property of the maker of the notes. She was claimed by certain persons, VanEvery and Rumball, residing in the United States, and thereupon the sheriff obtained an order for an interpleader between them and the execution plaintiff. This was accordingly tried, and resulted in favour of the claimants, after apparently a hard contest. No leave was obtained from this court by the execution plaintiff, to the registrar of the court being made a party to the interpleader, or to the litigation at law being carried on, and now on the registrar being pressed for payment of the costs under the judgment against him on the interpleader, this motion is made. The proper and obvious course was to have obtained the sanction of this court, which I think would have been given to the contest at law. This not having been obtained, the applicant has to make out a special case to get out of the fund these costs which were incurred at his own risk. For this purpose, it is shewn on affidavit that William Gibbard, one of the plaintiffs acting for himself and the other plaintiffs, has had the management of this suit, and that with his knowledge and consent the registrar was made a party to the interpleader suit, and litigated in it the claim to the vessel; and it is also shewn that there was a similar acquiescence by the Northern Railway Company, one of the principal creditors of the partnership. It also appears that Gibbard is likewise one of the principal creditors. The suit at law on behalf of the defendant appears to have been instituted under the advice of the solicitor and counsel engaged in winding up the partnership, and to have been maintained *bona fide*, and with the object of endeavouring to make the boat subject to the execution, and under the belief that the plaintiffs in the interpleader could not make out a valid claim to her. The solicitor for the defendants assents to these costs being paid, and no one makes any objection. I may assume then that all parties were willing

that the claim of the plaintiffs at law to the vessel should be disputed, and if they had any objections to it they should have made it before, and not waited to see if they would be successful, willing, in that event, to endorse the proceeding Ex. p. Edmondson, re Thompson, L. T. N. S., vol. 6, p. 234. Still no such proceeding should have been undertaken without the sanction of the court, if the parties meant to look to the fund in court for their costs, as they ran great risks of being refused them. Under the circumstances stated, I will, in this case, make the order for payment of the costs at law, but only as between party and party, and I will not allow the costs of this motion, as the parties have acted irregularly and might have avoided it by an application to the court at the proper time for permission to litigate under the interpleader order. Neither should the solicitor charge his client with any costs thereon, as the motion has been rendered necessary by his fault or oversight. The costs incurred against the defendant at law subsequent to the judgment on the interpleader must be paid by him or his solicitor.

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### STERLING v. CAMPBELL.

*From what time certain defendants are parties—Petition—Allowing creditors to come in.*

In a foreclosure suit, the master at Whitby made the usual order making certain judgment creditors parties, on the 26th of April, 1861; but they were not served till the 3rd day of June following. They did not appear before the master, and, after he had made his report, they applied by motion to be allowed to come in and prove their claims.

*Held*, that they were parties to the suit from the day that the master made his order; that the application by motion was regular, and need not be by petition, and that they might come in and prove their claims on terms.

In this case the usual decree of foreclosure was made, with a reference to the master at Whitby, who made an order in the usual form, making several registered judgment creditors of the defendant Campbell parties to the suit, and signed the notice to incumbrancers required by the general orders of the court, in such cases, on the 26th day of April, 1861; but none of the parties were served till the 3rd day of June following, when they were duly served,

through their attorneys. None of these parties appeared before the master, or proved any claim before him, till after he had made his report, when they applied to the judge in Chambers, on notice, to be allowed to come in and prove their claims.

*McGregor*, on behalf of the applicants, cited *Day v. Goulding*, (1 Hogan, 211,) *Fosbrooke v. Woodcock*, (12 Jurist 956,) *Cooper v. Wood*, (5 Beavan, 391,) and *Tidd's New Practice*, 16, (ed. of 1837,) as to the time from which the applicants were to be deemed parties; *Jones v. Roberts*, (12 Simons, 189,) *Heathcote v. Edwards*, (1 Jacob, 504,) and *Shipbrook v. Hinchinbrook*, (13 Vesey, 387,) to shew that the application by motion was sufficient; and 1 *Grant's Ch. Practice*, 574, (4th ed.,) and 2 *Smith's Ch. Practice*, 270, (2nd ed.,) in support of the applicants' rights.

*Fitzgerald* for the plaintiff, and *McDonald* for a *puisne* incumbrancer who proved his claim before the master, contended that the applicants were not parties to the suit till they were served, in which case they would have lost their lien, by reason of the statute 24 Vic., ch. 41: that the application should be by petition, and not by motion, and that the applicants, having lain by until they thought that they might prove their claims with effect, owing to the amount reported due to the plaintiff being less than had been supposed, had forfeited their right to the relief asked.

After looking into the practice, the following memorandum was made by

SPRAGGE, V. C.—I think the applicants were parties from the time of the master's order making them so. As to their priorities, my impression is that when a motion is made upon notice they are entitled to their proper priority; I think it is so in administration suits not disturbing any prior dividend. I incline to think the application may be on motion without petition; the course of proceeding in administration suits would be an analogy.

I made the above note very shortly after the argument. The matter was afterwards alluded to upon another application, and parties appeared to assent that my impression was correct. The order may go on the usual terms.

## DICKEY V. HERON.

*Practice—Purchaser at sale under decree—Opening biddings—Costs.*

The rule of the court is, that a purchaser at a sale under the decree is not bound by any irregularity in the proceedings so as to cause him to lose the benefit of his purchase; where, therefore, the master in settling the conditions of sale had given permission, contrary to the general orders of the court, to all parties to the cause, including the plaintiff, who had the conduct of the sale, to bid; and in his report erroneously stated that the sale had been duly advertised in two newspapers for four weeks next preceding the sale, when in reality it had been published in one of the papers for two weeks, and in the other for three weeks only; but the practice under the general order of court of the 22nd February, 1862, being that the party having the conduct of the sale, and not the purchaser takes and files the report of the master, and there being no allegation of the purchasers having been aware of these irregular proceedings, or any ground for imputing bad faith to them in the transaction, the court refused an application made on behalf of the debtor to set aside these sales on account of such irregularities; and ordered the debtor to pay to all parties, including the purchasers, the costs of the application.

The practice of opening up biddings observed upon.

In this suit the usual sale decree had been made referring it to the master at Hamilton to take accounts and add incumbrancers; and under the decree the sale of a large and valuable quantity of lands had been effected. After the report of the master approving of the sales had been confirmed a motion was made on behalf of the debtor to set aside the sales on the grounds of irregularity, (stated in the judgment,) or to open up the biddings upon an advance in price.

*McGregor and S. H. Blake* opposed the application.

The cases relied on appear in the judgment of

*SPRAGGE, V. C.*—The application is to set aside the sale on the ground of irregularity, or to open the biddings upon the offer of an advance. Three parcels of the land of the defendant Heron in the county of Norfolk have been sold, and the purchases were by three persons, strangers to the suit.

The sale took place on the 15th of April, 1863, in pursuance of a final order for sale, dated the 8th of December, 1862.

The first objection is that this order was irregularly obtained; the report of the amount due by Heron not having been filed until after the day appointed for payment, and

two cases in this court are cited, *Lee v. Smith* and *Sparkall v. Rogers*, one decided by the Chancellor the other by my brother *Esten*, in which final orders for foreclosure were set aside on that ground. It is contended that the objection has not been waived by the long delay that has taken place, on the ground that the order is a nullity. I cannot understand the order being a nullity, though it may be erroneous; and in a case before Sir *John Leach*, *Levi v. Ward*, (1 S. & S. 334,) it was held that an order to serve a defendant (plaintiff in a suit at law) resident abroad, by service upon his attorney at law, was erroneous by reason of the insufficiency of the affidavit upon which it was founded; and Sir *John Leach* said that, if it had been a question of irregularity he should have been of opinion that the defendant had waived it by his conduct, but being not strictly an irregular, but an erroneous order, the principle of waiver could not save it. Against this may be set the opinion of Mr. Justice *Patteson* in *Esdale v. Davis*, (6 Dow. P. C. 465,) who said: "There are cases where it is laid down that a man cannot waive an irregularity if he does not know of it; but the rule is that when he does know of it he must come promptly. What is meant by the rule that he is bound to come promptly, is, that he is bound to come promptly after he knows of the proceeding in which the supposed irregularity exists; and not after he knows of the irregularity itself. A man is bound to know of every proceeding taken against him, and if there be any error in it he ought to ascertain that error; he cannot be heard to say he did not know of it." This is the language of a common law judge; but the rule is the same in this court; were it otherwise, a party might leave orders unobjected to; might act upon them; and take proceedings himself and then find some irregularity in an affidavit, or the filing of some paper, upon which the order is made; and notwithstanding delay and acts of waiver, set aside the order and subsequent proceedings taken upon it. It would be very unfortunate if such were the rule of this court.

Mr. Heron does not say that he had not notice of this order when it was made, or notice of the intended sale in pursuance of it; it is certain that he had notice of the sale

immediately after it took place, for he says in his affidavit that he would have applied immediately after the sale to open the biddings, but that he was unable for about six months afterwards to find any one willing to give more than the prices at which the land was sold. I should not think the making of this objection in October, 1863, as coming promptly within the rule, even if the question was between the parties to the suit.

But here it is sought to affect third parties ; to set aside a purchase by strangers. I think a stranger purchasing is not affected by proceedings in the suit, further than this, that he must see that there is a decree or order of the court authorising the sale that is made. Lord *Redesdale*, in the House of Lords, in *Colclough v. Sterum*, (3 Bligh. 181,) laid down a rule to that extent. He said, "It is a settled maxim of equity, that persons purchasing under decree of this court are bound to see that the sale is made according to the decree. \* \* The decree protects parties only according to its terms ;" and he adds, "on this account the judgment is erroneous, and the purchase is with notice, because the title is founded on the decree." In that case the sale was subject to certain incumbrances, to which it was not made subject by the decree.

But irregularities in the proceedings do not affect the purchaser. In *Lloyd v. Johnes*, (9 Ves. 64,) Lord *Eldon* spoke of the irregularity of the proceedings in the suit as most blameable, but said, nevertheless, "Then, is the purchaser to lose the benefit of his purchase by the irregularity of the proceedings ? I dare not say a purchaser is to be answerable because an estate was directed to be sold in this court, when as yet the accounts had not been taken, to determine what was finally to be the charge upon the estate to be sold."

In *Bennett v. Hamill*, (2 S. & L. 675,) Lord *Redesdale* inclined to think the decree under which lands belonging to the heir of a deceased debtor had been sold erroneous, in not giving the heir a day to shew cause, and he also noticed objections made by the heir, that there was no sufficient account of the general estate ; and that the proceedings

before the master were a fraudulent contrivance between the executrix and the judgment creditor; and his lordship observed that as between the parties they were matters which would require investigation; but supposing these circumstances to be clearly true as stated, he thought, after considering the subject a good deal, that it would be too much to say that a purchaser under such a decree can be bound to look into all these circumstances, adding, "if he is, he must go through all the proceedings, from the beginning to the end." Further on his lordship said, "If he gets a proper conveyance of the estate, so that no person whom the decree affects can invalidate his title, although the decree may be erroneous, and therefore to be reversed, I think the title of the purchaser ought not to be invalidated;" and he added this just and weighty observation, "If we go beyond this, we shall introduce doubts on sales under the authority of the court which would be highly mischievous."

I refer upon the same point to *Latwych v. Winford*, (2 B. C. C. 248,) and to *Bowen v. Evans*, (1 J. & L. 178,) and I add the great authority of Lord *St. Leonards*, in his treatise on vendors and purchasers, that the cases establish the general rule, that the purchaser shall not lose the benefit of his purchase by any irregularity in the proceedings in a cause.

The report of the sales made by the master at Hamilton states that the advertisement of sale had, according to the master's directions, been published in the *Toronto Globe* and the *Norfolk Messenger* newspapers once in each week, for the four weeks immediately preceding the sale. This report was not confirmed until the 17th of October, 1863, owing to some errors in the report of the amounts of purchase money, which required correction; the order correcting those errors at the same time confirmed the report. It appears that the master was wrong in stating that the advertisement had been published once in each week for the four weeks before the sale, which took place, as he states, on the 15th of April. At any rate it now appears upon affidavit that instructions to publish were not received at the office of the *Norfolk Messenger* until the 28th of March, and that the advertise-

ment was published only on the 2nd and 10th days of April ; and that instructions were received at the *Globe* office on the 27th of March, to publish on the 28th of March, and on the 4th, 11th and 15th days of April, and that the advertisement was published only on the three first named days. But the report of sale being now taken by the plaintiff, and not, according to the English practice, by the purchasers, the purchasers come within the protection of the principle to which I have alluded ; that he is not affected by errors or irregularities in the proceedings. The conditions of sale gave liberty to all parties including the party who conducted the sale to bid. It is true that he did not bid ; and that the auctioneer publicly announced before the sale commenced that he would not bid ; but it was stated in the advertisement that all parties to the suit would be at liberty to bid. This was calculated to prejudice the sale, and the fact of the vendor having liberty to bid is open to the most serious objections. As was said by the court in *Popham v. Exham*, (10 Ir. Ch. 451,) "a party who has the carriage of proceedings in a cause stands in a fiduciary position to all the parties and incumbrancers in the cause. \* \* \* The plaintiff's solicitor prepares conditions of sale. He is bound to see that these conditions are not of such a character as to deter parties from bidding. It is the duty of the plaintiff, acting through his solicitor, to see that the intended sale shall be duly advertised, and hand-bills posted and circulated, so as to give publicity to the sale. The time when the sale should take place is often important. The plaintiff and his solicitor in the character of vendors have a duty imposed on them—to sell for the best price that can be obtained. If the plaintiff or his solicitor purchased, their interest is in direct conflict with their duty ; because in their character of purchasers they would or might be anxious to purchase at an under-value." And as was said in *O'Connor v. Richards*, (Sausse & S. 259,) the party having the conduct of the sale has complete control over the proceedings : he can fix the time for selling ; can arrange the conditions of sale ; and can adjourn the sale whenever he pleases. I may observe here that I find in the advertisement a condition of sale in regard

to title deeds which, while it may have been proper under the circumstances, is still an unusual one and one calculated to deter purchasers.

I do not think I ought to pass over without disapproval the carrying in and settling of conditions of sale allowing the vendor to bid, a thing wrong in principle and which the court has always refused to sanction ; and I think it right to ascertain where the fault lies of the report of sale certifying untruly to the court as to facts upon which the court was to act.

The proceedings in this cause, to which I have adverted, are very much to be lamented ; a sale by which creditors were to be satisfied, and in which purchasers have become interested, is rendered abortive, and the necessary tendency is to bring sales by this court into disrepute, although not justly, because purchasers are entitled to hold their purchases, notwithstanding irregularities in the proceedings in the suit.

As I stated at the hearing of this application, I should be against setting aside these sales, assuming them to be duly confirmed, upon a mere advance of price. There may be a loss in particular instances by refusing to open biddings ; but taking all the sales together, I am convinced there would be a great gain. Lord *Eldon*, in *White v. Wilson*, said most truly, “I could not do a thing more mischievous to the suitors than relax further the binding nature of contracts in the master’s office,” and I do not think that he exaggerated the evil when he added, “half the estates that are sold in this court being thrown away upon the speculation that there will be an opportunity of purchasing afterwards by opening biddings,” to which may be added, that many are probably kept away from sales by this court by the knowledge that their purchases are not final ; and that in proportion to the goodness of their bargain is the probability that some one else will advance upon it, and that they will not be allowed to retain the benefit of it.

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This was afterwards brought before the full court on appeal, when the order of his honour the Vice-Chancellor was affirmed with costs.

## DOUGALL V. WILBURN.

*Practice—Orders of course.*

Where the bill is filed in an outer office, the order for production and other orders of course are properly obtainable at such office and not from the registrar.

This was an application by *Scott* for the plaintiff for a direction to the registrar to issue an order for production; which that officer had declined to issue on the ground that the bill had been filed in the office of one the deputies, but

**VANKOUGHNET, C.**—Although the order if issued by the registrar might not be absolutely wrong, one cannot fail to see that much inconvenience would be apt to result from pursuing the practice which is now suggested. I shall decline therefore to give any direction to the officer.

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## GLENNIE V. GLENNIE.

*Alimony suit—Costs.*

The test in regard to the allowance of costs in alimony suits appears to be whether or not they have been vexatiously incurred. Therefore, where notice of examination and hearing was given and afterwards countermanded, upon its coming to the knowledge of the wife after notice had been given that the husband intended to produce a witness from abroad to prove adultery on her part while on ship-board: what was done having been done in good faith and the countermand given, in order that she might be prepared to rebut so serious a charge against her, it was deemed reasonable that the costs in relation to such notice and countermand should be paid by the husband to the solicitor of the plaintiff.

This was an application by *Fitzgerald* on behalf of the plaintiff for an order to the master to review his taxation of costs to the plaintiff under the order for interim alimony and for costs *de die in diem*, on the grounds stated in the judgment.

*Cattanach* contra.

**SPRAGGE, V. C.**—The costs in question are the costs in relation to the giving notice for examination and hearing, and the countermanding of the same. The plaintiff's solici-

tor claims that he is entitled to these costs against the defendant. The notice appears to have been countermanded upon its coming to the knowledge of the plaintiff that her husband intended to produce a witness from California and perhaps another from British Columbia, to prove adultery on the part of the wife with a third person on board ship; such intention being unknown to herself or her solicitor when notice was given.

The test in regard to the allowance of costs in alimony suits appears to be, whether or not they have been vexatiously incurred. In *Wells v. Wells*, (1 Sw. & Tr. 308,) condonation on the part of the husband of the adultery of his wife was set up and failed, the judge ordinary designating it as a miserable conspiracy to entrap the husband into a position which might be urged as evidence of condonation. Yet he allowed the costs to the wife's proctor, observing that the proctor defending a wife in a suit for divorce was always considered to be entitled to receive from the husband the reasonable costs of conducting that defence; and it being urged, that if he had exercised due diligence in ascertaining by what evidence the alleged condonation would be sustained, he must have known there was no ground for such a defence; the learned judge said, "It is difficult to draw the line in such cases, and a proctor, refusing to bring before the court any defence set up by his client and not plainly unfounded, would incur a very grave responsibility, and therefore I think the costs must be allowed."

It will be observed that the judge ordinary treats the question of costs as between the wife's proctor and the husband, not as between the wife and the husband, for in the case before him the wife could not have been entitled to the costs upon the issue of condonation, she having been a party to the conspiracy which he reprobated in such strong terms.

In *Allen v. Allen*, (2 Sw. & Tr. 107,) the question arose in regard to the allowance of the costs of certain issues raised by the wife, and upon which she failed. Upon that the language of the judge ordinary was, "I think that the only limit which can with propriety be put upon the allow-

ance of the costs of the different issues raised in this court is this: where the taxing officer is satisfied that an issue has been vexatiously and improperly put on the record so as to occasion a wanton and unnecessary increase in the amount of costs, he is not to allow the costs of that issue. The party guilty of putting such an issue on the record must take the consequences, and lose his costs; but that is the only limit."

In the subsequent case of *Harding v. Harding*, (2 Sw. & Tr. 549,) the wife's proctor was refused the costs of obtaining time to answer; and was also refused the costs of the personal examination of the husband; although certainly the proctor was not wrong in procuring such examination to be had, for the judge ordinary said, "You asked me to have the husband examined; and as I thought his answer a very extraordinary one, I ordered him to attend; but after hearing his examination I thought he had made out his case." The learned judge at the same time objected to the shape in which the question was raised, saying that it ought to have been brought before the court at the hearing, instead of upon the application to review taxation. In *Allen v. Allen*, however, the question had come up upon the like application.

Whether this last case is or is not to be regarded as narrowing somewhat the principle upon which, by the former cases, the wife's proctor is to be allowed his costs, I think the costs in question proper to be allowed. The evidence which is before me was before my brother *Esten* upon an application by the defendant to dismiss the bill; and he thought the wife ought to have until the spring of 1864 to bring on her suit. The declared intention of the husband to bring fellow passengers of the wife to prove adultery, made it reasonable that the wife should be allowed sufficient time to procure on her behalf the testimony of other passengers. The withdrawal, then, of the notice of examination and hearing was only a prudent act of self-defence; as it would have been rash and ill-advised to meet the threatened evidence with nothing to rebut it. Then, was the notice to examine and hear vexatiously or wrongly given:

the wife swears that she did not hear of this threatened evidence till afterwards; that before hearing it she fully intended to proceed; and that her hearing of it was her only reason for countering the notice.

If I saw reason for believing that the notice or countering was not in good faith, or was given wantonly or in mere carelessness, I should feel disposed to refuse the costs occasioned thereby, for I agree with what was said in *Halford v. Halford*, (3 Phil. 98,) that while the wife is not to be narrowed in her defence, yet her proceedings in the cause are to be watched with jealousy, because she has not, operating against her, the ordinary check of having to pay costs. But I believe what was done in this case was in good faith, and that the countering of notice was in order to her defence against a charge which it was of the very last importance to her to refute.

There will therefore be a reference back to the master to review his taxation of the costs in question.

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#### ELLIOTT v. HUNTER.

*Husband and wife—Separate answer.*

Husband and wife being defendants to a suit of foreclosure in respect of property belonging to the wife, the husband put in an answer alone, and the plaintiff moved to take the answer off the files for irregularity, and to take the bill *pro confesso* against the husband, which was refused with costs.

*F. T. Jones* for plaintiff.

*Fitzgerald* contra.

**SPRAGGE, V. C.**—The bill is for foreclosure, the mortgaged premises being the property of the wife, and she joining with her husband in the mortgage. It is, therefore, a proper case for a wife to answer separately. The husband has put in an answer. The plaintiff applies for an order to take the answer off the files, as irregularly put in, and a nullity, and for an order *pro confesso* against him.

The plaintiff cited *Thompson v. Lockwood*, (8 Irish Equity, 367,) before the Master of the Rolls in Ireland, wherein such

an order was made upon the authority of *Bilton v. Bennet.* (8 Sim. 17.) In the latter case the husband was at the bar of the court upon *habeas corpus*, in order to the bill being taken *pro confesso*. Sir *Launcelot Shadwell* doubted at first; the contempt being for want of the wife's answer, but made the order upon the ground that as no order had been obtained for the husband and wife to answer separately, the husband's answer ought to be treated as a nullity.

A previous case before Sir John *Leach*, *Garey v. Whittingham*, (1 S. & S. 163,) was not cited to Sir *Launcelot Shadwell*. The husband had put in a separate answer, in which he stated that his wife did not live with him, and that he had no influence over her. The wife put in no answer, and the husband was attached and in custody for want of it. The application was for his discharge. Sir *John Leach* doubted whether the husband could answer separately, without an order that his wife should put in a separate answer, but said, "The practice, however, seems to be to receive his answer, and yet if it were not a case in which an order might be obtained for the wife to answer separately, she must answer jointly; and then his answer must be taken off the file, in order that she may join in it. His separate answer will be put in only when the wife will not in fact join; and the receiving of his answer before he obtains the order upon the wife does in truth forward the proceedings." The husband was discharged from custody, and an order made on the wife to answer separately. If it had appeared to Sir *John Leach* that it was a proper case, by reason of the nature of the wife's interest, for her to answer separately, he would not have felt, what in that case seemed to him an anomaly, the taking of the husband's answer off the files, in order to her joining in it. It would seem in England to be the proper course for a husband, before answering separately, to obtain an order to enable him to do so, which he does upon grounds which excuse him from procuring his wife's joining in the answer; but whether an answer, before such order, is a nullity, may admit of doubt. It was certainly not so treated by Sir *John Leach*.

But however that may be, the English rule is founded

upon a reason which does not apply to our practice. In England a plaintiff is entitled to discovery by answer, and the defendant is in contempt if he makes default. If he and his wife are co-defendants, it is assumed *prima facie* that he ought to procure his wife to answer as well as to answer himself; he is as much bound to have her answer on the files as his own, and it follows that default in her answer is a contempt on his part. Hence, the rule that he must excuse himself by shewing his inability to do that which *prima facie* he is held bound to do.

But according to our system of practice and pleading the plaintiff is not entitled to discovery by answer, a defendant answers or not, as he thinks fit; where husband and wife are co-defendants, the husband can no more be bound to procure his wife's answer than to answer himself, and therefore, while he may answer himself, if he thinks fit, he cannot be bound to excuse himself for his wife's not answering, and it follows that his own answer without her cannot be improper. The plaintiff's course of proceeding seems plain enough. He may take the usual order for the wife to answer separately, and in case of her default, may take his bill *pro confesso* against her; and seems to me to be precisely in the same position in that respect, whether the bill has been already taken *pro confesso* against the husband, or he has answered. I must, therefore, refuse this application with costs. \*

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#### WILSON V. SWITZER.

##### *Set-off—Mutual debts.*

To entitle a party to set off one debt against another, it must be shewn that the debts are due from and to the same parties respectively. Where, therefore, a debt was due from A. to B., and an amount of costs was due from B. and his solicitor to A., the court refused an application made by B. and his solicitor to set-off the one amount against the other, although the effect of such a set-off would have been that B. would have paid a debt for which he was only jointly liable with another.

The facts of this case are fully stated in previous reports, ante pp. 44 & 75. When judgment was given as reported

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\* In a case of Clark v. McIlroy, the same question was subsequently brought before the full court, and the point now decided was affirmed.

on the latter occasion, the Vice-Chancellor suggested that the question, as to the right of set-off where the debts were not mutual, had not been discussed, and desired that the point should be spoken to, and the same was some time afterwards spoken to by counsel for both parties. After taking time to look into the authorities,

SPRAGGE, V. C.—Upon the point whether the sums which it is the object of this application to set off, one against the other, can be set off as proposed, they being due in different rights, I have consulted the authorities to which I have been referred.

Seth Wilson, to whom a large sum of money is due from the plaintiff, joins with McDonald in applying that a much smaller sum due by them both for costs to the plaintiff may be deducted from that debt. He thus offers to pay a debt for which he is jointly liable by deducting it from a debt due to himself alone. Such an application against him might not be so reasonable, but it is hard to see any reasonable objection, apart from the authorities, to the set-off proposed. The plaintiff owes a debt to Seth Wilson, and the latter proposes to discharge it *pro tanto* by allowing him a like sum on a debt due by him and another to the plaintiff; if due by himself alone, there could be no question. What he offers is to assume it as his sole debt *quoad* this transaction. The plaintiff is as much bound to pay Seth Wilson as Seth Wilson and another are to pay him; and it would appear to satisfy the utmost right that the plaintiff can have if the sum due from him is discharged and he acquitted from its payment by applying the amount due to him for that purpose. This is what I confess looks to me like natural justice between the parties.

Courts of common law in dealing equitably with sums due upon judgments recovered, have acted upon this principle, allowing set-off when the sums respectively due are not strictly between the same parties.—*Mitchell v. Oldfield*, (4 T. R. 123,) *George v. Elston*, (1 Scott 518,) *Starling v. Cozens*, (3 Dowling 782,) are instances of this; to which may be added *Fortune v. Hickson*, in the Court of Queen's Bench, in this province, (1 U. C. Q. B. 408.)

In *Ex parte Quintin*, (3 Ves. 247,) in bankruptcy, Lord *Loughborough* allowed a set-off under these circumstances: The petitioners were indebted to a partnership composed of two persons, one of whom became bankrupt and the bankrupt was indebted individually to the petitioners; the solvent partner was content to receive one-fourth of the partnership debts leaving the bankrupt to receive three-fourths. And Lord *Loughborough* allowed the petitioners to set-off their separate debt due by the bankrupt, against the proportion of partnership debts coming to his assignees, observing that in equity it would be very hard if it were otherwise, although he stated that at law clearly such set-off could not have been made.—*Ex parte Stephens*, (11 Ves. 24,) and *Ex parte Hanson*, (12 Ves. 346,) were cases where the joint debt was due from principal and surety, in each case to bankers, who became bankrupt, and in each case the principal debtor was sued alone. In the former case the bankers were indebted to the surety, and the set-off was allowed upon the joint petition of principal and surety: the court however proceeding in a great measure upon the fraudulent dealing of the bankers with the funds of the surety in their hands. In *Ex parte Hanson* fraud was not an ingredient in the case. The separate debt from the bankers was due to the principal, and the petition for set-off was presented by him. Lord *Erskine*, before whom the petition first came, put it in this way: “Suppose the bankruptcy had not occurred, a plea of set-off could not have been put in to an action by the bankers; but the moment they obtained judgment, *Hanson* (the principal) would have brought an action; and if the surety had paid the joint debt, would have re-paid him by the money recovered in that action: if *Hanson* himself had paid it he would then have been reimbursed; and if they had paid in moieties, they would then have divided it. So the thing would have been paid as if no action had been brought.” Upon the matter coming up afterwards before Lord *Eldon*, he observed that “the declaration of Lord *Erskine* upon that, is proper under the circumstances, upon this ground: the joint debt was nothing more than a security for the separate debt; and upon

equitable considerations a creditor who has a joint security for a separate debt, cannot resort to that security without allowing what he has received on the separate account, for which the other was a security." Lord *Eldon* appears to have chosen rather to support the order upon his own ground than upon the grounds assigned by Lord *Erskine*.

The subsequent case of *Vulliamy v. Noble* (3 Mer. 593) was also a case where there was a separate debt due by bankers, afterwards bankrupt, to an individual who was himself indebted to the bankers, as a principal, along with a surety. The bankers had improperly dealt with certain stock placed in their hands by the principal, and Lord *Eldon* allowed the set-off upon the same grounds as in *ex parte Stephens*.

This case differs from those cited in this, that the set-off sought is of independent debts arising out of dealings having no connexion with one another. In *ex parte Hanson*, the principal's debt was looked upon in equity as due from himself, and the debt due to himself was allowed to be set off against it. In the other case the ground of allowing the set off was fraud, and in the later one, *Vulliamy v. Noble*, Lord *Eldon* intimated (at page 618) that it required particular circumstances, when the debt was due in different rights, to entitle a party to set off in equity, when he could not do so at law. Here there are no particular circumstances; it is a simple case of a separate debt due by one, and a joint debt due to that one by two.

I confess I see no very sufficient reason why a set-off should not be allowed in this case, nor, as I have already said, what reasonable objection can be urged by the plaintiff; I think, too, that courts of common law have gone quite as far in dealing equitably with judgments recovered as is proposed upon this application. But, on the other hand, equity professes to follow the common law in allowing set-off, except where there are particular circumstances which ought in equity to make a difference. Certainly in the cases from the equity reports to which I have referred, there was no necessity for allowing set-off upon the special grounds upon which it was rested, if the law of set-off in equity were what

it is contended to be, on behalf of those who have made this application.

I feel myself compelled by the authorities to refuse the application.

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Subsequently, in a case of Hannon v. Hannon before the same learned judge, a similar motion was made for the purpose of setting off costs, payable out of a fund, but the application was refused, his honour stating that the application is in terms for a set off of costs. The defendant by bill, Joseph Hannon, asks that the costs given to him by the decree be set off against the costs given to the plaintiff by the decree. Both are payable out of the same fund, the balance of the moneys of the estate in the hands of Hannon as executor, this would not be a set-off; and besides such an order as is asked for would be varying the decree and cannot be granted.

The master's report was appealed from by the plaintiff, and supported by the defendant the executor, and the infant defendants, and the appeal was dismissed with costs, and the executor now asks further to set off his further costs of the appeal and the costs of the infants against the costs given to the plaintiff by the decree. It is stated upon affidavit that the moneys in the hands of the executor are insufficient to pay the costs given by the decree, and further, that writs of execution against the goods of the plaintiff for the costs of the appeal have been returned *nulla bona*.

If the parties entitled to receive the costs of the appeal were the same parties as are entitled to the fund in the hands of the executor, I should think the set-off proper; the plaintiff would in that case be entitled to receive certain costs out of a fund which belonged to defendants, who are entitled to certain costs against him, but here the fund belongs to these defendants *and other defendants*. That, it is true, makes no difference to the plaintiff. These defendants indeed might complain if the plaintiff sought such a set-off, because it would be paying the costs due by them and others out of a sum due to them alone. The same question

arose before me in *Wilson v. Switzer*, and I felt myself compelled by the authorities to come to the conclusion that in such a case there could be no set-off. Upon the same ground I must refuse this application.

This ground indeed was not taken, but appeared to me upon looking at the papers, but as I had already had occasion to decide the point, I did not think it would be useful to direct that it should be spoken to. I should not be sorry however to find myself mistaken, and to be corrected if wrong by the full court, and if the party making the application should claim to have the question re-heard, payment of the plaintiff's costs should be stayed in the meanwhile, but, if desired, the amount should be brought into court.

At present I must refuse the application and with costs, which I fix at 10s. only, as the grounds upon which the application was resisted are not in my opinion tenable.

The application, I should observe, is not quite accurate in point of form, in so far as it asks the set off of costs payable to the infants as well as of costs payable to the defendants making the application.

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### STEERS v. CAYLEY.

*Carriage of decree—Delay in taking out decree.*

By the present practice of the court it is irregular to deliver a decree to any party not entitled to the carriage thereof without an order to that effect: but where the plaintiff who was *prima facie* so entitled was guilty of great delay in proceeding under a decree pronounced, and a defendant beneficially interested applied for and obtained the decree from the registrar, which he carried into the master's office, a motion to give the carriage thereof to the plaintiff was refused with costs.

This was an application by *Downey* on behalf of the plaintiff to have the carriage of the decree taken from the defendant Taylor and committed to the plaintiff, no order to change the carriage of the decree having been ever granted or applied for.

*Crickmore*, contra.

ESTEN, V. C.—I think the plaintiff in the suit is *prima*

*facie* entitled to the carriage of the decree unless it is committed to some other party by the court. If he fail to carry the decree into the master's office within fourteen days after it is pronounced, any other party may apply to the court to have the carriage of it committed to him; but it is irregular to commit the carriage of the decree to any other party than the plaintiff without an order. I understand it to be admitted in this case that no such order has been made; but that the decree was drawn up by and delivered to the defendant Taylor without any order, and after, I presume, some delay on the part of the plaintiff. This proceeding would have been warranted by the ancient practice of the court, which, however, I think is altered by the general orders of this court in this respect. If considerable delay occurred on the part of the plaintiff either in drawing up the decree or in making this application, I should not be disposed to disturb the existing state of things. A memorandum of dates will probably enable me to judge.

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Subsequently a memorandum was produced to the Vice-Chancellor shewing that many months elapsed from the time the decree had been pronounced before the same was delivered out to the defendant Taylor, and that several weeks had been allowed to pass after the decree was carried into the master's office before this application was made. Under these circumstances the application was refused with costs.

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#### WOODSTOCK V. NIAGARA.

##### *Practice—Withdrawing replication—Amendment.*

An application for leave to withdraw replication and amend the bill by adding parties, where the cause had been set down for examination, and where the amendment would postpone examination till the following term, was refused with costs, the plaintiffs having been guilty of laches in making the application.

An amendment of a bill after replication, and long after bill filed for the purpose of stating a case of gross fraud, will not be allowed unless it appears on the clearest evidence that the plaintiff or his solicitor did not know, and could not with reasonable diligence have discovered, before filing the bill, the facts upon which the charge of fraud is grounded.

This was a motion by *Barrett* to amend the bill in this

cause in the particulars and under the circumstances set forth in the head note and judgment.

*Strong, Q. C., Taylor and S. H. Blake* for the several parties interested.

ESTEN, V. C.—This is an application for liberty to withdraw the replication and amend the bill in various particulars. With regard to all but two particulars I think the application may be granted, as it will involve no delay; but with regard to the addition of Holton, Balch, Courtwright, and Thompson as parties, and with regard to the case of gross fraud proposed to be made against all the defendants, I think it my duty to refuse the application. If the examination of witnesses, however, were not fixed for this term, I should think it right to grant the application as to the addition of the proposed new parties. But as to Holton, Balch, and Courtwright, the plaintiffs knew eighteen months ago that they were necessary parties, and although proceedings appear to have been stayed by mutual consent six months ago, yet at that time they had been aware of the necessity of adding the new parties for a whole year, as the cause was then appointed for examination during this term; and when the plaintiffs saw that the promises, made to them, were not likely to be fulfilled, they should have been on the alert even during the last six months. Under such circumstances it would be impossible to permit an amendment which would involve the postponement of the examination until next term. As to Thompson, it is not shewn when the facts upon which it is proposed to charge him first came to the plaintiffs' knowledge. The other amendment proposed to be made is much more objectionable. A gross case of fraud is proposed to be stated against the defendants after the bill has been upon the file two years and a half, and without a tittle of evidence to shew that the plaintiffs or their solicitor were not aware, or could not with reasonable diligence have discovered the alleged facts upon which it is founded, before the institution of the suit. I could not permit such an amendment without the clearest evidence to this effect. As to Thompson, I would permit him to be added as a party

but for delaying the examination. The application must be refused with costs, except as to the particulars I have mentioned, in which the bill can be amended without incurring any delay. Should the examination not take place as appointed, but be postponed until next term, I should permit the proposed amendment to be made for adding parties; but would in no case permit the gross case of personal fraud proposed to be raised at the eleventh hour to be introduced upon the record without the clearest evidence that it could not with reasonable diligence have been presented at an earlier period.

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#### RE YAGGIE.

*Sale of infants' estates under 12 Victoria—Practice—Confirmation of report.*

By an order in an infancy application under 12 Victoria, it was referred to the master to take an account of the value of the crops grown on the premises during a given year and of what had become thereof, and how much had been converted by one J. O. to his own use beyond one-third thereof; and it was ordered that said J. O. on service of the order and report should pay into court the amount found due by the master. *Held*, that the order being final so far as J. O. was concerned, the report made in pursuance thereof did not require confirmation.

This was an application to set aside a writ of *fieri facias* issued against the goods, &c., of John Otto, under the circumstances stated in the judgment.

*Fitzgerald*, for the application.

*Roaf*, contra.

**SPRAGGE, V. C.**—The question raised is whether the master's report made in this matter is of a nature and made upon an order that makes confirmation of it necessary before it can be acted upon.

The reference was "to take an account of the value of the crops grown upon the said premises during the present year, and of what has become thereof, and of how much has been converted by the said John Otto to his own use beyond one-third thereof," and it was ordered that Otto should immediately upon the service upon him of the order and of the report to be made in pursuance thereof, pay into court the

amount which the master should find to be due ; it was also referred to the master to tax costs against Otto, and payment of them was directed. No further directions were reserved ; the order was final so far as Otto was concerned, although not necessarily a final order in the matter of the infancy.

I think the case of *Empringham v. Short*, (11 Sim. 78, 81,) as decided by Lord *Cottenham*, upon appeal, must govern this case. Indeed the rule laid down by Mr. *Danie*, (Am. ed., page 1485) since that case applies to this. The enquiry in *Empringham v. Short* was, what reparation the defendant ought to make for the damage done to the testator's estate in ploughing up certain pasture land and sowing the same with mustard, flax and poppy seed. Sir *Lancelet Shadwell* thought that the report required confirmation, observing that the reference was of a very special kind ; but Lord *Cottenham*, upon appeal, went upon a different ground, viz. : that the order under which the reference was made was final ; that it directed the defendant to make the reparation when the amount should be ascertained by the master.

Mr. *Daniel*, after referring to this decision, says :—“ It would seem therefore that wherever the discretion of the court is exercised upon the first order, and when the master is only called upon to perform some act or make some enquiry necessary for carrying out the order which the court has made, the report of the master will not require confirmation.”

This appears to me to be a just deduction from the case of *Empringham v. Short*. In the following page, (1486,) Mr. *Daniel* draws the distinction where the report is required for the purpose of enabling the court to make some discretionary order or decree, the report in that case requiring confirmation, before it is adopted as the foundation of such future order or decree.

The like distinction appears to have been in the mind of Lord *Langdale*, in *Beavan v. Gilbert*, (8 Bea. 311,) though the case did not call for a decision upon it.

I do not think that section 7 of order 42 was intended to apply to any report which did not require to be confirmed before the order. It was intended to make the lapse of time a

substitute for express order; not to make confirmation necessary to a new class of reports.

The application is refused with costs.

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### WOODSIDE V. DICKEY.

*Order to elect.*

A. & B. were plaintiffs in an action at law to recover from the defendants therein, an Iron Manufacturing Company, a demand for goods sold, moneys paid and advanced, &c. A. having become embarrassed in his circumstances assigned his estate and effects for the benefit of his creditors, and he and his trustees subsequently filed a bill in this court against the same defendants, praying an account of certain partnership dealings between A. and the defendants, who had been carrying on the same kind of business as the Manufacturing Company. From the statements in the pleadings on both suits, it appeared that A. had been a partner with the defendants as iron founders; and that A. & B. were creditors of the defendants, who also carried on iron works, involving in effect the allegation that there were two concerns carrying on similar business, and that he was a partner in one and not in the other. Under this state of facts one of the defendants had obtained, upon *præcipe*, the common order to elect in which court the plaintiffs would proceed, which upon motion was discharged with costs.

This was a motion by *Stephens* to discharge an order which had been obtained upon *præcipe* calling upon the plaintiffs to elect in which court they would proceed, on the grounds stated in the head note and judgment.

*S. Blake*, contra.

**SPRAGGE, V. C.**—The defendant Nathaniel Dickey has obtained the common order to elect; this is an application by the plaintiffs to discharge it.

The bill is for an account of partnership dealings between the plaintiff Boomer, (of whom the other plaintiffs are assignees,) and the defendants; who as the bill alleges carried on business as iron founders from the 1st of October, 1854, to the 1st of July, 1858. In the action at law Boomer and one Richard McPherson are plaintiffs, and the defendants are the same as are defendants in this suit. The particulars of demand set out an account against "the Toronto Iron Works," for goods furnished, moneys advanced and paid, &c., from July, 1854, to the end of March, 1858; so that upon the pleadings in the two suits, Boomer alleges that

he was a partner, with the two Dickeys and O'Neil, as iron founders; and that he and McPherson are creditors of the Dickeys and O'Neil, who also carry on iron works; involving the allegation that there were two concerns carrying on similar business, and that he was a partner in the one and not in the other.

It is admitted by the plaintiffs' solicitor that there are not, as these pleadings import there are, two firms in which the defendants are partners, carrying on iron works or the business of iron founders, but one only; and that Boomer was a partner therein, and he alleges that McPherson was a partner with Boomer in the hardware business during the latter portion of the time only, covered by the particulars of demand at common law; and that those particulars erroneously cover a period when Boomer alone carried on business as a hardware merchant, and made the advances, and furnished the supplies specified in the earlier part of the particulars, and he professes in this suit not to claim for any thing during the period of McPherson's partnership with Boomer.

*Mr. Blake*, for the defendants, asks for the usual reference whether the suits at law and in this court are for the same matter; and it must be admitted that if McPherson was not a partner of Boomer during any portion of the time covered by the particulars, then the supplies and advances specified therein were furnished by one partner to the firm of which he was a member—advanced from part of the account to be taken in this suit—while Boomer in the name of himself and McPherson is suing for the same matter at common law. On the other hand, if there was a partnership between Boomer and McPherson, then what was furnished to the iron foundry during their partnership cannot be brought into the accounts in this suit, at least as at present constituted, so that the determination of the question of partnership between Boomer and McPherson would determine whether the suit at law and in this court are for the same matter. But if I made such a reference all that could be made to appear in favour of the application is that the action at law is in part for the same matter as this suit, and the plaintiffs in this suit would almost necessarily have to elect to proceed

in this suit; the consequence of which would be that the proceedings at law would be enjoined; and this anomaly would be involved, that I should restrain proceedings at law in the absence of one of the two plaintiffs at law: it would involve the determination of two points contrary to the allegations in the declaration at law, one that McPherson was not a partner with Boomer as alleged; the other that the firm sued at law consisted of Boomer, the Dickeys and O'Neil, instead of the Dickeys and O'Neil as alleged.

It is true that the admission of the solicitor for the plaintiffs in this suit that there is only one iron foundry, and that Boomer is a partner, admits that which states the plaintiff out of court at law, inasmuch as it admits that Boomer is at law suing himself, but I have nothing to do with that; and his admission cannot affect McPherson; and taking his admission altogether I must say that he has cause of suit in this court, and that there is a technical objection to his suing at law.

I think this is not a case in which I can make the usual reference to the master; the question of partnership between Boomer and McPherson, and of the parties who composed the firm to whom supplies of goods and money were furnished will properly arise in the action at law: I think they cannot properly be tried upon a reference to the master.

I must therefore grant this application, and with costs to be fixed by the registrar.

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#### BOWMAN V. BOWMAN.

*Garnishee order—Attachment of debts in hands of administrator.*

A debt due to an administrator in his representative character cannot be attached to answer a debt due by the administrator in his private capacity.

Whitley moved to set aside a garnishee order obtained by the defendant attaching all debts due by the defendant Summerfelt to the plaintiff on the grounds stated in the judgment.

Fitzgerald contra.

SPRAGGE, V. C.—The plaintiff filed her bill in this cause as administratrix to the estate of her late husband, William Robert Bowman: the bill charges the defendants with having possessed themselves of portions of the estate, and seeks an account from them.

This cause and all matters in difference between the parties was referred to arbitration, and the arbitrators found that the plaintiff had no cause of action or suit against the defendants Bowman, and awarded against her their costs of suit, and of the reference and award. As to the defendant Summerfelt, they found that the plaintiff had cause of suit against him, and awarded that he should pay to her \$266 39 cents, which sum they found that he was liable to pay to her as administratrix of the estate of her husband.

The defendants Bowman obtained a garnishee order—Summerfelt being the garnishee—that all debts due by him, the garnishee, to the plaintiff, should be attached to answer an amount therein referred to, being the costs awarded to be paid by the plaintiff to the defendants Bowman.

The principle question raised upon this application is, whether the sum awarded to be paid to the plaintiff can be attached to answer the sum payable by the plaintiff to the defendants Bowman, and I am of opinion that it cannot.

The point was in effect decided in the old case of *Hodge v. Cox*, (Cro. Eliz. 843,) referred to in *Lock on Foreign Attachment*, p. 45, as authority for this passage: “A debt due to a deceased person cannot be attached on a plaint against his personal representative, although he be sued under that description, unless he be sued for a debt due from the deceased.”

In the late case of *Hirsch v. Coates*, (25 L. J. C. P. 315,) the judgment debtor had, before judgment, assigned certain debts which were afterwards the subject of garnishee proceedings, and it was held that they could not be garnisheed. In the course of the argument *Cresswell*, J., asked: “Why should we give a larger operation to the 61st section than to an assignment in bankruptcy, the object of which is to give every thing possible to the creditors?” And *Willes*, J., in giving judgment took the same ground; and the Chief

Justice said: "and it must be a debt in respect of which the judgment debtor has a beneficial interest." In *Westoby v. Day*, (22 L. J. Q. B. 418,) one of the grounds of decision was that the judgment debtor must have a beneficial interest in the debts garnisheed, and not be a mere trustee.

Here it is not contended but that the costs payable by the plaintiff to the defendants, Bowman, is a personal debt against the plaintiff, and not against the estate; and that the debt sought to be garnisheed, is a debt not due to the plaintiff personally, but to the estate of which she is administratrix; and it follows, I think, that to allow that debt to be garnisheed would be to pay a private debt of a personal representative with the moneys of the estate. It is not shewn nor even alleged that the plaintiff is beneficially interested in the money payable by Summerfelt; it is alleged in the bill and for aught that appears it is the fact that there are several creditors to a large amount now pressing for the debts due to them by the estate; such creditors might have great reason to complain if a debt due to the estate, instead of being applied in paying them, were applied in paying the costs awarded to be paid by the plaintiff.

The case as presented to me is the naked one of a debt due to an estate being sought to be applied in payment of a debt due not from the same estate but from the personal representative of the estate; a point which I think could admit of no reasonable doubt even if there were no authority against it.

The garnishee order must be discharged with costs.

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## BANK OF BRITISH NORTH AMERICA v. HEATON.

*Receiver—Mortgagee—Application of rents of mortgaged premises.*

It would seem that a first mortgagee has not, as such, a right to the rents and profits of the mortgaged premises. Where, therefore, a puisne incumbrancer filed a bill and obtained the appointment of a receiver, who had since his appointment collected the rents and profits of the property, and paid the same into court, and a prior incumbrancer, who was not a party to the first suit, filed a bill upon his mortgage, and moved in that cause for an order to apply the rents, so paid in by the receiver, to payment of his claim, the court, under the circumstances, refused the application with costs, but gave the plaintiff liberty to renew the same, in such manner and in such suit as he should be advised.

This was an application by E. B. Wood, for an order that the rents and profits collected by the receiver appointed in the suit of Joseph v. Heaton might be paid out to the plaintiffs, all parties other than Joseph being consenting parties thereto.

*A. Crooks, Q. C., contra.*

The cases cited are mentioned in the judgment of

SPRAGGE, V. C.—The plaintiffs are first mortgagees of defendant Heaton. In another suit, Joseph v. Heaton, to which the bank were not parties, a receiver was appointed at the instance of the plaintiff Joseph ; that order was made without reserving the rights of the plaintiffs. The receiver, since his appointment, has been in receipt of the rents and profits of the mortgaged premises, and has paid them into court, and the plaintiffs in this suit now as first incumbrancers, ask that they may be paid to them.

I have examined the cases to which I have been referred, Gresley v. Adderley, (1 Swans, 573,) and Thomas v. Brigstocke; (4 Russ. 64,) and I have also referred to Bertie v. Lord Abingdon, (3 Mer. 560,) Brooks v. Greathed, (1 J. & W. 176,) Norway v. Rowe, (19 Ves. 144,) and Smith v. Earl of Effingham, (2 Beav. 232,) and some others. I do not find any instance of the granting of such an order as that now applied for. The principle established by the cases seems to be that what is gotten in by the receiver is for the benefit of those for whom it is provided by the order appointing him, and Lord Eldon says, in Norway v. Rowe, that the constant habit of the court upon motions for the appointment of a

receiver is not to look at mortgagees further than to take care that they are not prejudiced. In some cases the first mortgagee having the legal estate has been prejudiced, because the court having given possession to the receiver will not suffer such mortgagee to exercise his legal right without at least obtaining the leave of the court; the court has sometimes granted such leave, and sometimes put him to be examined, *pro interesse suo*: the case of Smith v. the Earl of Effingham comes nearer in its circumstances to this than any that I have seen. Some years before the institution of that suit, one Bridges, a subsequent incumbrancer to Smith, filed his bill against the trustees of the debtor and made the incumbrancers parties, omitting however to make Smith, who was first incumbrancer, a party; the priorities of the several incumbrancers, omitting the plaintiff, were declared, and a receiver was appointed, who was directed to keep down the incumbrances according to the declared priorities: Smith filed his bill ten years after the bill filed by Bridges against the parties to the former suit and the receiver, alleging ignorance of the proceedings in the former suit; that the parties had notice of his claim, and had fraudulently omitted to make him a party; and he alleged the existence of an outstanding term as an obstacle to the exercise of his legal right: he prayed by his bill to be declared first incumbrancer; for payment of his arrears, (he was an annuitant,) and that the receiver might pay over the balance in hand, and be enjoined from making further payments to the defendants. What was asked at the bar was that the receiver might be enjoined from making any further payments until further order. It was objected that the application was irregular, being made in a different suit; and that there was no impediment to Smith's recovering at law: the application went off upon the point of form, Lord Langdale declining to decide the rights of the parties: but he observed that if the appointment of the receiver were the only obstacle, the proper remedy would be for Smith to ask leave, in the suit in which the receiver was appointed, to enforce his legal remedies. It was suggested by counsel that he might have applied in that suit to be examined *pro interesse suo*.

If that course were adopted his right I apprehend would not be larger than if he proceeded at law, viz., the receipt of the rents and profits from that time. If Lord Langdale was right in what he indicated as the proper course (and what he said was quite in accordance with the authorities) the first incumbrancer has no right to rents and profits received anterior to the time of establishing his own rights by some proceeding in reference to such rents and profits; the same objection applies to the form of this application as was made in *Smith v. Lord Effingham*, but I did not understand any objection to be made upon that score. It is suggested on behalf of the plaintiffs that they were in possession of the mortgaged premises when the receiver was appointed, but deferred to his appointment in the belief that he would apply the rents and profits in the payment of incumbrancers according to their priorities. It would be premature to say whether that circumstance, supposing it to be established, ought to make any difference. I think the proper course now is to refuse the application with liberty to renew it, in such form and in such suit as the plaintiffs may be advised.

This application must be refused with costs.

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#### MANNING v. CUBITT.

*Production of papers—Principal and agent—Parties.*

Three members of a vestry being appointed a building committee, and by it, one of the three treasurer thereof: the treasurer being a sub-agent cannot be compelled, in a suit, by a member of the vestry on behalf of himself and all other members except such treasurer, who was the defendant, to produce papers in his hands as treasurer—the other members of the committee being necessary parties.

*Semble*, where a defendant admits, in his answer, the possession of documents, and in answer to an order to produce files an affidavit excusing production, the answer and affidavit must be read together.

The argument came on in Chambers on motion for an order *nisi* for commitment for non-production under an order to produce.

Mr. Cattanach for the plaintiffs.

Mr. Moss for the defendant.

ESTEN, V. C.—This is a suit by a member of the vestry of St. John's Church, Darlington, on behalf of himself and all other members of the vestry except the defendants, for an account of the dealings of the defendant Cubitt, in his character of churchwarden, which he formerly was, and for the specific delivery of all books and papers in his possession connected with that office. In this suit an order was obtained directing Mr. Cubitt to produce all papers and documents in his possession relating to the matters in question in the cause in the usual terms. He resists the production of certain documents which are in his possession, and the reason he assigns for such refusal is that the documents in question do not belong to the vestry, but to certain persons composing a committee which had been appointed to superintend the erection of the church, of whom he was one, and of whom he had been appointed the treasurer. Supposing these documents to be in his possession as such treasurer, this application, which was for an order *nisi* for his commitment, would raise the question, whether if a person appoints another his agent and he appoints a sub-agent and delivers to him documents connected with the business of the agency, the principal could file a bill against such sub-agent alone, and without making the agent a party, for an account of his dealings as agent, and to compel the production of papers in his possession as such sub-agent; and I should think that such a suit could not be maintained, nor the sub-agent compelled to produce the documents so in his possession, although indisputably the property of the plaintiff in a suit so constituted. Mr. Cubitt states these documents are the property of the building committee. I should doubt the correctness of that assumption, except perhaps as to the private account book. It can hardly be doubted that the persons composing the building committee would, if present, be compellable to produce these documents; but I think their agent could not be so compelled in their absence; and if that be so, it can make no difference that he happens to be one of the building committee himself, or to have filled the office of churchwarden at the same time that he acted as treasurer of the building committee. It does not however appear that

he has these documents in his possession as treasurer. It is quite consistent with the affidavit that they might have been surrendered to the vestry by the building committee, and that they may be in the defendant's possession as late church-warden, in which case he would be compellable to produce them. I will not grant the order *nisi* at present; and the defendant may have an opportunity of amending his affidavit. I may add, that it appears to me that where the defendant has by his answer admitted the possession of documents material to the question and afterwards the common order is obtained under which the defendant produces an affidavit excusing the non-production of documents, the answer and affidavit must be received together, and the court will form its conclusion upon both combined.

In the present case the answer seems to admit the possession of two documents as churchwarden, which the defendant by his affidavit claims to withhold, but under such circumstances I should think greater weight was due to the affidavit.

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### LEY v. BROWN.

*Solicitor's lien—Delivery of papers.*

Where a solicitor refused to carry on a suit unless money was advanced, or to deliver up the papers to a new solicitor until his costs in the suit were paid, the court on application by the client ordered a taxation, and directed the papers to be delivered up to the new solicitor upon his undertaking to hold them subject to the lien, if any, of the former solicitor, and to re-deliver them within ten days after he ceased to have occasion for them for the purposes of the suit.

*Morphy*, for the application.

*Turner*, contra.

**SPRAGGE, V. C.**—This is an application by the plaintiff to compel his late solicitor Mr. Turner to deliver up to the present solicitor the papers and documents in his possession, and for taxation of his bill. Mr. Turner was his solicitor only in this suit, and upon receiving instructions he was paid £12 10s., the receipt for which expresses that it was on account of £30 which he was to receive in full of costs in the event of

his failing in the suit. The petitioner states that he has since paid to Mr. Turner about £21; that a decree for an account has been obtained, but that Mr. Turner has refused to proceed without the advance of more money; that the plaintiff is unable to advance more money, and believes that Mr. Turner is indebted to him on account of the suit; that Mr. Turner has all the books, papers, and accounts belonging to the suit, and refuses to deliver them up or to proceed with the suit, unless supplied with more money; and that the suit cannot be proceeded with without such books, papers and accounts. The petition is verified by affidavit.

The question is whether the client is entitled under the circumstances to delivery of the books and papers in question for the purpose of the further prosecution of the suit, or only to an inspection and taking of copies and production.

In the older cases the client was held entitled to the lesser remedy only. In *Commerell v. Poynton*, (1 Sw. 1,) and in *Moir v. Mudie*, (1 S. & S. 282,) in each of which the solicitor refused to proceed, a delivery of papers was asked, but inspection and production and liberty to take copies only were granted; but in *Colegrave v. Manley*, (T. & R. 400,) where a solicitor assigned his business to another solicitor, retaining, however, such connexion with it as gave him an oversight of it, Lord *Eldon* held that the solicitor, having dissolved the connexion between himself and his client, was not entitled to hold the papers to answer his lien, and he was ordered to deliver them to the new solicitor appointed by his client, upon the latter giving a receipt for them, and undertaking to hold them, subject to the lien of the former solicitor for what should be found due to him upon taxation of his bill of costs.

This case was followed by *Heslop v. Metcalfe*, (3 M. & C. 183,) upon appeal from the Vice-Chancellor, before Lord *Cottenham*, who reviewed the previous cases upon the subject, and agreed with *Colegrave v. Manley*, observing, "It is admitted that when the solicitor discharges himself, the client and his new solicitor shall at all events have free access to inspect and copy the papers at the office of the former solicitor. The mere giving of access, however, is, nine times out of

ten, of no practical value; for if the papers are to remain, notwithstanding in the custody of the solicitor who has discharged himself, it is obvious that they cannot be made use of in the further progress of the suit;" and he proceeds to point out how this would be so, and adds, that it would be entirely inconsistent with the *dictum* of Lord *Eldon*, that the suitor must have his business conducted with as much ease and celerity, and as little expense, as if the connexion had not been dissolved. In *Heslop v. Metcalfe*, as in this case, the solicitor had refused to proceed unless furnished with more funds. The order made in that case was, that the papers should be delivered to the new solicitor, on the latter giving his undertaking that they should be received without prejudice to any right of lien, and also, that they should be returned undefaced within ten days after the hearing of the cause.

In a later case, *Wilson v. Emmett*, (19 Bea. 233,) Sir *John Romilly* followed *Heslop v. Metcalfe*.

It seems, therefore, to be now settled that upon a solicitor refusing to proceed, either because he is not furnished with funds or otherwise, he must deliver up the papers in his hands to his client's new solicitor for the purposes of the suit, but for these purposes only. He is not bound as at law, having once commenced to proceed with the suit, but may dissolve the connexion between himself and his client, and still preserve his lien upon his client's papers in his hands: as was said by Lord *Cottenham*, in *Heslop v. Metcalfe*, "the principle should be, that the solicitor claiming the lien shall have every security, not inconsistent with the progress of the cause;" but inasmuch as any thing less than a delivery of the papers would not enable the client to have his suit conducted with as much ease and celerity, and as little expense as if he had them, a delivery of the papers is ordered.

The proper order in this case will be that all books, papers, and accounts belonging to the client in the possession of his late solicitor, Mr. Turner, be delivered to his present solicitor, Mr. Hodgins, upon the latter giving an undertaking to hold them subject to Mr. Turner's lien for what, if any thing, shall

be found due to him upon taxation of his bill of costs, and to return them undefaced to Mr. Turner within ten days after he shall cease to have occasion for them, by obtaining a decree on further directions or otherwise, in case any sum that may be found due to Mr. Turner shall not be in the meantime paid. The usual order to go for taxation of Mr. Turner's bill of costs.

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IN RE CALLOCOTT, INFANTS, AND 12 VIC., c. 72.

*Sale of infants' estate.*

Where property was devised by a testator to his widow for the maintenance and raising of his family until the coming of age of the youngest child, and then to R. one of the sons charged with certain payments at intervals to the widow and other children, with a provision for the substitution of another son in the event of R. dying under age or without issue, *held*, 1. That the court had no jurisdiction to order a sale or mortgage of such property, the court having no power under 12 Vic., ch. 72, to dispose of the real estate of infants against the provisions of any last will by which such estate was devised to such infants. 2. That such property was not the real estate of the infants within the meaning of the act.

*Cattanach*, on petition for sale of infants' estate and appointment of guardian, read depositions and examinations. The facts appear sufficiently in the judgment.

SPRAGGE, V. C.—The statute 12 Victoria, chapter 72, empowers the court to order the sale, leasing or other disposition of the real estate of infants in the cases, and for the purposes specified in the act, with this qualification, “that no such real estate shall be so sold, leased or otherwise disposed of as aforesaid in any manner against the provisions of any last will, or of any conveyance by which such estate was devised or granted to such infant, or for his or her use.” By the will of John Callicott, the father of the infants who apply under the act, the real estate for the sale of which they apply is devised to his widow “for the maintenance and raising of the family” until the coming of age of his youngest child, and then to Robert, one of his sons, charged with the payment of certain sums at intervals named in the will to his widow and certain of his children, with a provision for the substitution of another son for

Robert in the event of his dying under age or without issue. The application is that the land may be sold, or a portion sold and a portion mortgaged, in order to pay off a mortgage upon a portion of the land, and to pay the debts of the testator, for which purposes one portion, the least valuable one, would suffice, and for the maintenance of the infants. Robert is stated in the petition to be 17 years of age. The will provides for the preservation of the *corpus* of the estate for the future benefit of Robert, assuming that the rents and profits will be sufficient for the bringing up of the family. To sell the *corpus* now, or to sell a portion and mortgage another portion of it now, would be against the provisions of the will, and so an act excepted from the authority of the court by the proviso to which I have referred; there is besides this further difficulty, that the land proposed to be sold is not the real estate of the infants within the meaning of the act.

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LEDYARD V. MCLEAN.

FITZGERALD V. THE UPPER CANADA BUILDING SOCIETY.

*Motion to rescind or vary direction of master—Appeal from master's order.*

All applications in the nature of an appeal from a master's judgment should be made in court and not in Chambers.

In the first mentioned case a motion was made to rescind or vary a direction of the master directing a plaintiff to bring in a statement of the names of certain persons with a view of making them parties in his office.

*Blake* for the plaintiff.

*Roaf, contra.*

SPRAGGE, V. C., ordered the matter to be brought on in court, and to be set down in the paper of appeals from the master's report. [See this cause 10 Grant's Ch. R., page 139.]

In the other case *Crickmore* moved for an order to discharge an order of the master, making parties defendants in his office.

*G. Murray*, contra, objected that the application should be made in court and not in Chambers.

VANKOUGHNET, C.—Mr. *Murray*'s objection must prevail. My brother judges and myself have settled that in future all motions in the nature of an appeal from the master's judgment must be made in court, otherwise we might have a student of one year's standing discussing the propriety of a master's decision.

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#### RUTTAN V. SMITH.

*Scandalous answer—Reading brief by counsel—Waiver of irregularity.*

Filing a replication waives all irregularities in any answer previously filed, but does not waive scandal therein. If objected to, a brief of pleadings cannot be read unless the court can refer to the original pleadings, or an office copy of them to verify the brief. Where an answer is in the opinion of the court *prima facie* scandalous on its face, the onus rests with the party filing it to shew its relevancy to the question raised by the bill.

In this case the bill and all subsequent pleadings had been filed at Cobourg. The original bill had been answered and amended, and an answer to the amendments had been filed after the time allowed therefor, and subsequently the plaintiff had filed his replication, and now *McLennan*, for the plaintiff, moved to take the answer to the amended bill off the files for irregularity, as being filed after the proper time, and also for scandal. In order to shew the irrelevancy of the answer in question to the matters of the amended bill, counsel was about to read a brief of the amended bill, when

*Hector*, contra, objected that it could not be read, as it was not shewn that the brief was a true copy of the amended bill on the files.

VANKOUGHNET, C., refused to allow the brief to be read, saying that though an objection of the kind was very unusual, yet when taken it must prevail. The plaintiff's counsel should have been provided with an office copy of the bill, or have caused the original on the files to be transmitted from Cobourg, so that it might be referred to.

The difficulty was obviated by Mr. McLennan reading an office copy of the answer in question, which being in the opinion of the court *prima facie* scandalous on its face,

VANKOUGHNET, C., held that the onus was thrown on the defendant to prove its relevancy to the matters in question.

The merits of the motion were then gone into, and the following references made by counsel for plaintiff: Taylor's Orders, p. 195; Daniell's Ch. Pr., 3rd ed. 241; *Ex parte* Simpson, 15 Ves. 476.

*Hector*, contra, referred to 1 Smith Ch. Pr. 878; Lord St. John v. Lady St. John, 11 Ves. 525; Montriou v. Carrick, 6 Jur. 97.

VANKOUGHNET, C., held that the replication filed must be taken to be to the second answer, as well as the first, and consequently any irregularity as to it had been waived, but that the filing of such replication did not waive the scandal, and after taking time to look into the authorities cited, ordered the answer to be taken off the files for scandal, with costs.

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### IRVING v. STRAIT.

*Service of bill by publication.*

On moving for an order to serve an absconding defendant by publication it must be shewn where the defendant last resided, and whether he has any relations within the jurisdiction, and, if so, that enquiries have been made of them as to his whereabouts.

*Cahill* moved for an order for service of bill by publication, on affidavit shewing that efforts had been made to find the defendant, but that he could not be found: the affidavit did not shew where the defendant last resided, nor whether he had any relatives within the jurisdiction.

VANKOUGHNET, C.—You must shew where the defendant last resided and whether he has any relatives in the country, and, if so, that enquiries have been made of them as to his whereabouts.

Order refused.

## SPENCER V. LEEMING.

*Order absolute to commit for non-production in master's office.*

Where an order *nisi* has been duly served to enforce the filing of accounts in the master's office and accounts are filed, but the master certifies that they are insufficient, it is the practice to grant an order absolute *ex parte*. The practice is a harsh one however, and, if asked, an opportunity will be given to shew the sufficiency of the accounts.

*S. H. Blake* moved *ex parte* for an order absolute for committal for non-compliance with the direction of the master at Hamilton to file an account verified by affidavit. An order *nisi* had been obtained and served, and it appeared from the master's certificate that an account and affidavit had been filed in pretended pursuance of the order *nisi*, which, however, the master certified to be insufficient.

*VANKOUGHNET, C.*—I believe it is the practice to grant an order *ex parte* under the circumstances. I think the practice a harsh one, however, and that it requires amendment, as it may be that the accounts are really sufficient notwithstanding the master's certificate, I must follow the usual practice however, and grant you the order.

*McLennan* afterwards on the same day mentioned the matter, stating that the account and affidavit had been prepared by himself, and that he was unaware in what they could be defective, and asked to have an opportunity of arguing as to their sufficiency: his lordship accordingly directed that the order absolute should not issue till *McLennan* had been served with notice of motion.

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## SCOTT V. McKEOWN.

*Final order—Master's report undated.*

Where the master's report, directing the payment of mortgage money on a day being six months from the date thereof, is not dated, and the decree gives six calendar months, a new day must be appointed for payment.

This was a motion for a final order of foreclosure. The report ordered the money to be paid on a certain day, "being six months from the date hereof as directed by the decree;"

the report was not dated, and the decree directed the master to order payment at the end of six *calendar* months; the papers were in other respects regular, and now a final order was asked for on the ground that the words "as directed by the said decree" were evidence that the master had complied with the decree and appointed six *calendar* months; or if the final order should be refused, that then an order might be granted directing the original report to be amended by the insertion of the date.

VANKOUGHNET, C.—I must refuse the final order. In the absence of any date to the report, the words six months in the report must be construed to mean six lunar months; the master must therefore be taken not to have allowed the time directed by the decree. I must also refuse to allow the report to be amended, as I cannot sit here to remedy errors occasioned by the negligence of solicitors; you must take an order appointing a new day for payment, such order to be served seven days at least before the day appointed according to the usual practice.

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*Spencer* afterwards produced a consent from the owner of the equity of redemption duly executed and attested, on which the final order was allowed to go.

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#### IN RE ATKINSON AND PEGLEY.

*Petition to tax solicitor's bill.*

On an *ex parte* application of a client by petition for the taxation of his solicitor's bills of costs, the common order only can be obtained; if a special order is required notice must be given.

A client had been served by his solicitor with two bills of costs in two suits, and he now, by *C. A. Jones*, presented his petition for an *ex parte* order to refer the same for taxation, and that the master should be directed to enquire whether both suits were necessary or proper—the petition alleging that the suits were for foreclosure, and both against the same party.

VANKOUGHNET, C.—I believe it has been decided in England that, on an *ex parte* application of this kind, only the common order to tax can be obtained. You can therefore take the common order if you desire, but if you require a special one you must give notice.

See also post 193.

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#### GOULD v. HUTCHINSON.

*Swearing affidavit in Lower Canada—Infants—Appointment of guardian—Service of notice of application.*

Where it appeared that no commissioner under statute for taking affidavits to be used in Upper Canada resided nearer than 210 miles from a place in Lower Canada where an affidavit of service was to be made, an order was made directing the affidavit to be sworn before one of the ordinary commissioners for taking affidavits in Lower Canada.

G. M. Evans moved *ex parte* under the following circumstances: there were six infant defendants to the suit, the eldest a girl about eighteen, and the next a boy about sixteen, all residing with their father at Mattice, in the county of Rimouski, about 210 miles below Quebec, in Lower Canada. It was necessary to appoint a guardian to these infants, notice of the application for which would have to be served at Mattice, and an affidavit of service thereof made. It was alleged that no commissioner under the statute for taking affidavits to be used in Upper Canada resided nearer than Quebec, nor was there any judge resident in the neighbourhood, and

VANKOUGHNET, C., granted an order directing the father and the eldest boy and girl to be served with the notice of the application, the notice to be returnable in three weeks, and the affidavit of service to be sworn before one of the ordinary commissioners for taking affidavits in Lower Canada for use there.

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## RE HANSELL.

*Sale of infant's estate.*

It is the practice now where the estate of infants is of small value, in order to save the expense of a sale by auction, to direct an advertisement to be inserted in a newspaper, asking tenders addressed to the registrar to be made for the property.

*Hoskins* renewed application made previously before his honour Vice-Chancellor *Spragge*, for sale of infant's estate. An offer had been made for the property, but it did not appear that it was a favourable one.

**VANKOUGHNET, C.**—I do not think the offer should be accepted without seeing whether a better one cannot be obtained. Let an advertisement be inserted once a week for the next three weeks in a newspaper in the neighbourhood of the property for tenders to be addressed to the registrar. This will be less expensive than putting the property up for sale by auction.

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## WALKER v. TYLER.

*Foreclosure suit—Separate answer of wife—Order pro confesso—Decree on præcipe.*

It is not necessary that the bill should be taken *pro confesso* against a husband before an order to answer separately can be obtained against his wife, it is sufficient that the time for the joint answer shall have elapsed. In a foreclosure suit to which a married woman is a defendant, it is not necessary that the bill be taken *pro confesso* against either the husband or wife, the proper practice is, when the time for answering by both has elapsed, to apply in Chambers for a direction to draw up the decree on *præcipe*.

This was a suit for foreclosure of the estate of a married woman, her husband being a co-defendant. An order *pro confesso* had been obtained against the husband, and the bill and order for the wife to answer separately had been duly served on her, and *Snelling* now moved for an order *pro confesso* against her on default of answer.

**VANKOUGHNET, C.**—It was unnecessary to obtain an order *pro confesso* against the husband, as it is sufficient to show that the time for a joint answer has elapsed in order to obtain an order for a separate answer against the wife, and

it is now unnecessary to take the bill *pro confesso* against the wife. Let the ordinary decree go on *præcipe*.

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### IN RE HEALEY.

*Investment of moneys for the benefit of infants.*

An application to invest the moneys of infants pursuant to an order of this court should be made by the infants, and not by the persons wishing to borrow.

In this matter an order had been made by his honour Vice-Chancellor *Esten* to invest the proceeds of real estate of infants and an adult for their benefit, and *McMurray* now moved on behalf of a person proposing to borrow, for the sanction of the court to the investment.

*E. Blake* appeared for the adult.

*Downey* for infants.

*VANKOUGHNET, C.*—I cannot entertain such an application on behalf of the borrower, it should be made on behalf of those wishing to invest the money.

Application refused.

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### ELLWOOD v. SCOTT.

*Service of order on absconding defendant.*

Service of an order appointing a new day for payment of mortgage money will be dispensed with where the mortgagor is an absconding defendant, against whom the bill has been taken *pro confesso* after service by publication.

*Hoskin*, asked for a new day to be appointed for payment of mortgage money, and that the service of the order on the defendant might be dispensed with, he having absconded, and the bill having been served upon him by publication, and no answer having been put in,

*VANKOUGHNET, C.*, granted the order as asked.

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## RUTTAN v. BURNHAM.

*Dismissal for want of prosecution—Undertaking to speed—Filing replication—New practice thereon.*

On a motion to dismiss for want of prosecution after great delay, it is now the practice as established by *Vankoughnet*, C., with a view to enforce diligence in the prosecution of suits, to refuse an undertaking to speed where no explanation of the delay is given, and also to refuse to allow the motion to be intercepted by the filing of replication, any thing to the contrary in the practice in England notwithstanding.

*G. D. Boulton*, moved to dismiss for want of prosecution.

*McLennan*, for plaintiff, offered to give the usual undertaking to speed, to which *Boulton* objected, alleging that this was the second motion of the kind which had been made; and that there had been great delay, the bill having been filed on the 2nd of December, 1862, and no replication having been yet filed, and that it was too late to go to examination at the ensuing term.

**VANKOUGHNET, C.**—It was formerly the practice with my brother judges to accept an undertaking of this kind, but since I have been here I have established a different practice, to which I intend to adhere, viz., to refuse to accept such undertaking where no explanation of the delay is given.

*McLennan* then asked an enlargement, to enable him to procure, if possible, an affidavit explaining the delay, and the enlargement was accordingly granted; subsequently, it was alleged on behalf of the plaintiff that replication had been filed since the case was last mentioned, and that the plaintiff was willing to go down to examination at the ensuing term, if the defendant would accept short notice, which *Boulton*, however, declined to do. The matter was a third time spoken to, *McLennan* urging that, according to the established practice both here and in England, the filing of a replication is always held to be an answer to a motion to dismiss.

**VANKOUGHNET, C.**—I have no doubt that you will find abundance of authority in support of your proposition that the filing of a replication is an answer to a motion of this kind,

but I refuse to acknowledge the authority as laid down in the books, and since I have been sitting here have refused to allow a party to intercept a motion to dismiss in that way. I cannot compel the defendant to accept short notice, and the bill must be dismissed with costs.

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### IN RE PATTON.

*Lunatic—Medical evidence—Practice.*

An application to declare a person a lunatic without the expense of a commission must be supported by affidavits of more than one medical man. *Sembler*, also, that notice of the application should be given to the lunatic; but that it will be dispensed with where service on the lunatic would be dangerous to him. The fitness of the proposed committee must be shewn in affidavit.

This was an application by petition to declare one William Patton, a lunatic, without the expense of a commission. The medical evidence produced was an affidavit of Joseph Workman, medical superintendent of the Provincial Lunatic Asylum.

SPRAGGE, V. C.—This application is made on the eve of my leaving on circuit; my impression is that the one affidavit of a medical man, however competent and trustworthy, (named by the family,) is less than the court requires even for a commission. I should incline also to require that the alleged lunatic be notified, and that access be given to his professional adviser. If a commission sat he would have to be produced: some inmates of the asylum imagine that they are there unjustly; they are probably wrong; but there are many who are competent to instruct counsel as to their cases.

Afterwards the application was renewed before his lordship the Chancellor, when a satisfactory affidavit from another medical man was produced, and also an affidavit shewing the fitness of one of the members of the proposed committee but not of the other: it also appeared that the officials at the asylum would not allow the service of the petition, as the lunatic was suicidal, and it might be dangerous to do so, under the circumstances,

VANKOUGHNET, C., allowed the order, declaring Patton to be a lunatic, to go, and the two persons named to be appointed committees on production of an affidavit of fitness as to the one whose fitness had not been sworn to.

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SCOTT v. McDONELL.

*Final order foreclosure.*

On an application for a final order of foreclosure, the affidavit of the plaintiff should shew that he has not been in possession, or in the receipt of the rents and profits, of the premises.

This was an application for a final order of foreclosure; the papers were regular except that the affidavit of the plaintiff did not negative possession, or receipt of rents and profits of the premises.

SPRAGGE, V. C., therefore refused the order.

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IN RE ATKINSON AND PEGLEY, SOLICITORS, &c.

*Petition by client to tax his solicitor's bill.*

A special order will not be granted, directing the master to enquire as to the necessity of bringing two suits of foreclosure respecting two mortgages between the same parties, as the master has jurisdiction to make such enquiry and disallow the whole bill without any special direction, under the common order to tax.

Jones, C. A., applied by petition on notice for an order to tax two bills of costs rendered to a client by his solicitors, and asked that the order might contain a direction for the master to enquire whether two suits were necessary, and if not, to disallow the bill of costs in one of them.

Blake, S. H., contra.

VANKOUGHNET, C., after consulting with the taxing officer of the court, (Mr. Hemmings,) refused to make any other than the common order, on the ground stated in the head note.

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## IN RE MILNE.

*Lunatic—Commission.*

Lunacy matters should be disposed of before one and the same judge.

*Turner* renewed an application made previously before his honour Vice-Chancellor *Esten*, for a commission *de lunatico inquirendo*.

*Blake, S. H.*, contra.

*VANKOUGHNET, C.*, refused to hear the application and ordered it to stand over, to come on before his honour Vice-Chancellor *Esten*.

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## WEIR v. WEIR.

*Alimony—Enlarging publication and extending undertaking to go down to examination and hearing.*

An order made on a motion to dismiss, giving leave to go to examination, has the effect of opening publication. An offer by a husband to support his wife separately is no bar to a suit for alimony, and an affidavit of the husband shewing his willingness to support his wife separately cannot be received.

It appeared that a motion to dismiss for want of prosecution had been made, and the plaintiff had then given an undertaking to go down to examination at the next term at Ottawa. He had in pursuance of such undertaking regularly set the cause down. The solicitor of the defendant, Mr. Lewis, had been changed to Messrs Mowat and McLennan, and the plaintiff by mistake had served notice of examination and hearing on Mr. Lewis, instead of Messrs. Mowat and McLennan, and the mistake had not been discovered in time to serve a fresh notice within the proper time, the sittings at Ottawa being for the 20th May, 1864, and *Hoskin* now moved on behalf of the plaintiff for leave to serve short notice or for an order extending the undertaking till the fall term at Ottawa: an affidavit was read shewing the above facts, and that the application was made in good faith and not for the purpose of delay.

*McLennan*, contra, urged that as the replication had been

filed on the 13th of June, 1863, publication had passed after the ensuing term at Ottawa, viz., in September, 1863, and that the order made on the motion to dismiss had not the effect of opening publication. He also contended that he could not be compelled to take short notice, and that the bill should be dismissed, and also filed an affidavit of the husband shewing that he and the plaintiff were living together again, and that he was willing to support her separately if she wished, and urged that therefore this suit was quite unnecessary, and should be put an end to.

*Hoskin*, in reply, read an affidavit of the wife positively denying the alleged cohabitation, and contended that the order made on the motion to dismiss, the words of the undertaking therein being "to go to examination and hearing," had the effect of opening publication.

VANKOUGHNET, C., decided that the order made on the motion to dismiss had the effect of opening publication, as it expressly gave permission to go to examination; and as to the offer of the husband to support his wife separately, and the alleged cohabitation, remarked, I think the husband is bound to receive his wife into his house, and that he cannot support her elsewhere, except under the order of this court if she wishes. A husband cannot under either human or divine law maintain his wife in one establishment and the other part of his family in another: he must cleave to her, leaving all others. If he refuses, he subjects himself to the order of this court. I cannot receive the affidavit of the husband that he is willing to support his wife, when possibly next week he may be unwilling. I do not think I ought to deprive the wife of the protection of the interim order—if the suit is stopped the interim order will be gone. It does not appear that the allowance is too much, and it does appear that the parties are living apart, and it is not shewn the husband is willing to receive the wife. I will not dismiss the bill, as another might be filed to-morrow, and an interim order obtained on the state of facts as shewn at present. Let the order go extending the undertaking to

next term, without prejudice to any further application by the husband.

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### MCKAY v. REED.

*Order to limit a time to do certain acts.*

Where an order to do a certain act does not limit the time thereof, an order limiting the time therefor will be granted *ex parte* Form of such order.

It appeared that a decree had been made ordering the plaintiff to execute a deed to the defendant, and the defendant to execute a mortgage to the plaintiff, both deed and mortgage had been drawn up and approved by the master, and the deed had been duly executed by the plaintiff, but the defendant had refused to execute the mortgage : the decree did not limit a time within which the defendant should execute the mortgage, and an order was now asked *ex parte* to supply the omission.

VANKOUGHNET, C., granted the application. The form of the order to be, that the defendant do execute and deliver to the plaintiff, or execute and deposit with the master, the mortgage within one week after service of order.

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### ANONYMOUS.

*Leave to make new application.*

Where an application has been refused with costs, and a motion is made for leave to make a new application of the same nature, on further evidence, the new evidence must be produced, and the costs of the former application paid.

An application had been made which had been refused with costs, and now *Morphy* asked leave to make a new application on further evidence, the evidence, however, was not produced.

*McLennan*, contra.

VANKOUGHNET, C.—Before granting leave you must let me see the new evidence, and you must also pay the costs of the former application.

## JAMES V. ROBERTSON.

*Guardian ad litem.*

The court will not, even at the request of the infant defendants, in an amicable suit appoint the plaintiff's solicitor their guardian *ad litem*.

This was an amicable suit, in which Mr. *Ince* was acting as solicitor for the plaintiff and some of the defendants. There were some infant defendants, and *Ince* now moved to have a guardian *ad litem* appointed to them, reading a letter from them to himself, asking him to act as their solicitor.

VANKOUGHNET, C.—I think some other solicitor had better act for the infants, as one cannot know what questions may arise. In a cause a short time since under similar circumstances I had to order the guardian to be changed.

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## McGILLIVRAY V. CAMERON.

Where an order for sale has been taken out *ex parte* by mistake in lieu of an order for foreclosure, the court will vacate the order for sale and grant an order for foreclosure *ex parte*.

This was an *ex parte* application for an order to vacate an order for sale which had been taken out *ex parte* by mistake in lieu of an order for foreclosure, and also for an order for foreclosure.

VANKOUGHNET, C., granted the application.

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## IN RE ENGLISH.

Where an application is made to compel a garnishee to pay over to the creditor debts due by him to the debtor, which have been garnisheed, notice must be served on such garnishee.

In this matter debts due by one Gordon (the garnishee) to Hiram Clarke, the debtor, had been garnisheed, and *Foster* now applied, on notice which had been served on Clarke only, for payment over by Gordon of the debts garnisheed.

VANKOUGHNET, C.—Ordered the matter to stand over, and notice to be served on the garnishee.

## GRANGE V. CONROY.

*Specific performance—Rescission after abortive sale.*

Where in a suit by a vendor for specific performance a decree for a sale has been made, with a proviso that if the sale prove abortive the contract is to be rescinded, and the sale proves abortive, and an application is made to rescind the contract, it must be shewn that the purchase money has not been paid.

This was a suit for specific performance by a vendor. A decree for sale had been made with a proviso for a rescission of the contract in case the sale proved abortive. A sale had been attempted, but it appeared by the master's certificate that it proved abortive for want of bidders. *Kennedy* now applied *ex parte* for an order absolute for rescission. It was not shewn, however, that the purchase money had not been paid.

**VANKOUGHNET, C.**—It does not appear that the amount found due has not been paid: you must show that the money has not been paid to the plaintiff: it may have been paid notwithstanding the abortive sale.

Application refused.

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**IN RE CASEY, BIDDELL V. CASEY.**

*Jurisdiction of master.*

The master at Toronto has jurisdiction to direct evidence proposed to be used on an enquiry before him to be taken before a master in an outer county, though not consented to.

The master had issued a warrant to shew cause why the necessary evidence should not be taken before the master at Belleville, on the return of which, after hearing both sides, he had directed the evidence to be taken at Belleville. *McLennan* now applied to quash this direction, on the ground that the master had no authority to make it, his authority only extending the length of directing evidence to be taken before a special examiner. He also contended that it was very inconvenient that the evidence should be taken by a master other than the one who would decide the case. He cited Order XLII., sec. 14.

*Hamilton, contra.*

ESTEN, V. C.—I think the master has the power to make the direction appealed against.

Application refused with costs.\*

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IN RE MYLNE.

*Order to change solicitor.*

The common order to change solicitor is obtainable as of course on præcipe.

This was an application for the common order to change solicitor.

ESTEN, V. C.—The common order is as of course, and can be obtained on præcipe. You need not come here for it. I have repeatedly refused applications of this nature.

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BOULTON v. STEGMAN.

*Vesting order.*

Where the property of infants has been sold under order of court, and the purchaser applies for a vesting order, notice need not be given to the infants.

This was an application on behalf of a purchaser of infants' estate sold in a mortgage suit for a vesting order: notice of motion had been served on the plaintiff and infants.

*Crickmore, for plaintiff.*

*Rae, for infants, asked for costs of a former motion and of this application.*

ESTEN, V. C.—The purchaser must pay the infants' costs, as notice to them was unnecessary.

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\* It is supposed the masters in the outer counties have the same authority.

## CADE v. NEWHALL.

*Leave to appeal from master's report.*

Notice must be given of a motion for leave to appeal from the master's report after the usual fourteen days from the filing has elapsed.

*Ince* moved *ex parte* for leave to serve notice of appeal from a master's report, the fourteen days having elapsed.

ESTEN, V. C., you must give notice.

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## COOTE v. MACBETH.

*Order to dismiss bill by plaintiff.*

After service of a bill on a defendant the plaintiff cannot dismiss his bill on *præcipe* against such defendant without costs, even though no answer has been filed.

*Cattanach* moved on behalf of three defendants to set aside an order obtained by the plaintiff dismissing his own bill; the order being irregular in not providing for the costs of the defendants had also been served with the bill.

*Smart*, contra, alleged that other defendants had answered, and that the order had been drawn up with costs as against them, and said nothing as to the costs of the defendants who had not answered.

ESTEN, V. C.—The order is wrong, it should have been with costs as against all the defendants; I cannot say that the defendants who have not answered have not incurred any costs, they may have instructed their solicitors and counsel. The order must be discharged with costs.

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## STEPHENS v. MEARS.

*Commission to examine witness abroad.*

In moving for an order for a commission to examine a witness abroad with a view of using his evidence in a pending reference to a master, the proper evidence on which to obtain such order is the master's certificate, and not an affidavit as to the facts.

*A. Cameron* moved for an order for a commission to examine a witness in Chicago. It appeared that the suit

was in the master's office, and the evidence to be obtained was to be used there; an affidavit as to the facts was about to be read, but

ESTEN, V. C., said the proper evidence on such a motion was the master's certificate, and referred to Order XLII. sec. 14. The order to go on the production of the certificate.

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### FARRELL v. STOKES.

#### *Final order foreclosure.*

The manager of the bank, where mortgage money is directed to be paid, should certify that the money has not been paid before, as well as on or since the day appointed.

HENDERSON applied for a final order of foreclosure against certain of the defendants, who were infants; the papers were regular except that the certificate of the bank manager, which was in a printed form, merely certified that the money had not been paid on the day appointed or since.

DAVIS, J. B., appeared for the infants, and alleged that the money would be probably paid in a few days, and asked for a short delay.

ESTEN, V. C., directed another certificate from the manager to be produced, showing that the money had not been paid before the day appointed as well as on or since, on production of which if the money was not paid in ten days the order was to go.

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### HODKINSON v. FRENCH.

#### *Delivery of possession after final order.*

An order to deliver up possession of mortgaged premises after final order of foreclosure will not be granted *ex parte*, notice must be served; it is not necessary however to demand possession.

This was an *ex parte* application for an order to deliver up possession of mortgaged premises after final order of foreclosure.

ESTEN, V. C.—It is necessary to give notice in these cases; you need not however demand possession.

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NOTE.—This decision as to demand of possession would seem to overrule *Nevieux v. Labadie*, ante page 13.

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### CROOKSHANK v. SAGER.

*Substitutional service—Time for answering.*

The same time must be allowed for answering a bill served by substitutional service as if the service had been personal.

*E. Boyd* applied for an order for substitutional service of an office copy of the bill on the wife of the defendant, who was residing in British Columbia. The wife was shown to be the agent of the defendant as to the subject matter of the suit, under power of attorney.

ESTEN, V. C., granted the order, allowing six months to answer the bill.

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### SOMMERRVILLE v. JOYCE.

*Order nisi for non-production.*

In moving for an order *nisi* for non-production in the master's office, the master's certificate as to non-production must bear the latest possible date.

*Osler* moved for an order *nisi* for non-production in the master's office at Hamilton; the motion was made on Monday, 30th May, 1864, and the certificate of the master at Hamilton was dated 27th May.

ESTEN, V. C.—You must get another certificate, the order may go on the production of it.

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## HEWARD v. WATSON.

*Order pro confesso after six months.*

The usual notice of two clear days is sufficient in moving for an order *pro confesso* after six months have elapsed from the service of the bill.

*Kirkpatrick* moved for an order *pro confesso* after six months from the service of the bill, ten days' notice had been given.

VANKOUGHNET, C.—I think the ordinary two days' notice is sufficient, take the order.

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## SHAVER v. ALLISON.

*Dismissal for want of prosecution.*

Where it appeared that a defendant who was in a position to move to dismiss was aware of the residence of a co-defendant whom the plaintiff could not (though using reasonable diligence, of which the defendant moving was aware) find to serve with the bill, a motion to dismiss for want of prosecution by such defendant was refused with costs.

*Hoskin*, for one of two defendants, moved to dismiss for want of prosecution.

*Foster*, contra, read an affidavit shewing that on the 27th April a letter had been written to the solicitor of the defendant moving, stating that he could not find a co-defendant to serve the bill upon him, and had since frequently told this to the clerks of such solicitor, the affidavit also shewed due diligence in the attempts to serve the co-defendant. *Ingle v. Partridge*, (12 W. R. 65,) was cited.

*Hoskins* in reply.

VANKOUGHNET, C., referred to the case cited, and as he thought due diligence had been shewn, and that the defendant moving was aware of the residence of the co-defendant, refused the application with costs.

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## ANONYMOUS.

*Absent defendant—Decree pro confesso.*

In moving for a decree *pro confesso* against a defendant who has been served out of the jurisdiction, it must be shewn that such defendant formerly resided in Canada and left the province.

This was an application for a direction to the registrar to draw up a decree on *præcipe* after service of the bill out of the jurisdiction. The affidavit of service and identity did not show that defendant had formerly resided in Canada and left the province, and

VANKOUGHNET, C., therefore, directed an affidavit of these facts to be produced, on which the decree was to go.

## BULLEN V. RENWICK.

*Liberty to appeal.*

Leave to appeal to the Court of Error and Appeal after the time therefor has elapsed will not be granted if the delay is not properly accounted for, especially if the position of the other party to the suit has been changed.

The case on re-hearing is reported at 9 Grant 202, judgment having been given in August, 1862. The defendant, an officer in her Majesty's service, was stationed at the Cape of Good Hope (for the greater part of the time in the interior of Africa) at that time and until the end of the year 1863, when he returned to England, where he arrived in February, 1864, and then became first aware of the result of the case by a letter from his solicitor, which was awaiting him at his agents in London. It was not shewn that any attempt had been made to communicate with the defendant at the Cape for more than twelve months after the judgment had been pronounced. *Snelling* now, under these circumstances, asked for leave to appeal to the Court of Error and Appeal, citing Con. Stat. U. C., p. 72, Error and Appeal Act, Sec. 56.

*Barker*, contra, contended that the delay had not been accounted for, that it was not shewn what state the cause was in, or what were the grounds of appeal. He also read an affidavit shewing that the plaintiff had, in pursuance of the

master's report, paid in the purchase money on 28th September, 1863, and had dealt with the property, and was therefore in a different position.

SPRAGGE, V. C.—There has been great delay, and it is not all sufficiently accounted for, and besides the position of the plaintiff has been changed—he has provided the mortgage money and paid it into court.

Application refused with costs.

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#### IN RE HANSELL AND 12 VIC., c. 72.

*Sale of infant's estate.*

All applications under 12 Vic., c. 72, for the sale of infants' estate must come on before the same judge.

This was an application for the sale of an infant's estate. It appeared that the case had been before his honour V. C. *Esten*, and had stood over, and

SPRAGGE, V. C., directed the case to stand over, to come on before the same judge.

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#### COMMERCIAL BANK v. COOKE.

*Judgment creditor's suit—Final order after abortive sale.*

In a suit by a judgment creditor to set aside a fraudulent settlement and to realize his judgment, praying a sale of the property on default in payment, if the sale prove abortive, *semble*, that the usual order for redemption, or in default, foreclosure will be granted; at all events it would be so if the judgment debt was subject to a prior mortgage which the judgment creditor would be entitled to redeem.

This was an application for a final order for foreclosure after abortive sale. The suit was by a judgment creditor to set aside a fraudulent settlement, and asking a sale of the property, not foreclosure. An application had been made before his honour, V. C. *Esten*, who doubted the propriety of granting such an order under the circumstances, and now the application was renewed, and 13 & 14 Vic., c. 63, *McMaster v. Noble*, 6 *Grant*, 581, were cited.

SPRAGGE, V. C.—The court would have granted foreclosure if asked for originally, and I suppose, in the event of default and final order, have vested the legal estate in the registered judgment creditor ; the plaintiff has the right of a mortgagee, and if in a suit by a mortgagee he is entitled to such an order as is asked for, I do not see how it can be refused to the plaintiff. In this case the plaintiffs' judgment is subject to a prior mortgage ; they are entitled to redeem that mortgage, and to have a conveyance of the legal estate from the mortgagee, and thereupon to be redeemed by the judgment debtor and mortgagor, or to foreclose him.

Usual order giving defendant three months to redeem, in default foreclosure.

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#### MILLER v. MCNAUGHTEN.

*Proceedings in the master's office—Costs.*

An application to compel a party having the carriage of an order made on an appeal from a master's report to proceed with the enquiry in the master's office, should be made to the master who has possession of the case, and not to a judge in Chambers.

This was an application by *Hamilton*, to compel the appellants from the master's report, having obtained the order thereon, to proceed with the enquiry.

—, contra.

*Foster* appeared for infants and asked his costs.

SPRAGGE, V. C.—I incline to think the application should be to the master who already has possession of the case, and who can better judge whether the order would be proper, and to whom it would be best to commit the further prosecution of the reference. I have conferred with the Chancellor upon the subject in order to settle the question as a point of practice, and he agrees with me. The infant's solicitor asks for costs and is entitled to them, and as he is brought here by an improper application his costs must be paid by the party who has made it. I give no costs to the defaulting party.

## MOUNTAIN v. PORTER.

*Final order foreclosure—Report not confirmed.*

Where the report appointing the time and place for the payment of mortgage money has not been confirmed before the day appointed for payment, a final order will not be granted.

*Evans* for final order for foreclosure.

SPRAGGE, V. C.—The report was not confirmed before the day appointed for payment, order cannot be granted, see *Lee v. Smith*, and *Sparkall v. Rogers*, referred to in *Dickey v. Heron*, Chambers Reports, 149, 150. You may take order appointing a new day.

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## ODELL v. DOTY.

*Foreclosure after abortive sale—Costs.*

It is unnecessary to present a petition for foreclosure after abortive sale, it is sufficient to serve a notice of motion on the mortgagor, and the extra costs of a petition and service thereof on parties other than the mortgagor will be disallowed.

This was a petition for foreclosure after abortive sale; it appeared that all the defendants had been served, the incumbrancers who had not proved, as well as the mortgagor.

SPRAGGE, V. C.—A petition is unnecessary, the plaintiff may take the usual order, subsequent interest to be computed and costs taxed by the registrar, who will disallow the petition and costs of serving it, and allow costs only of a notice of motion and service on the mortgagor only; the affidavit of Stamfield will also be disallowed, it proves what the court knows from its own records. In case there should be at any time a taxation between solicitor and client, the items above referred to ought to be disallowed.

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## BLACKBURN V. SHERIFF.

Where money is ordered to be paid into court, a payment to the solicitor of the party entitled to it is not a good one, and therefore is no ground for dispensing with payment into court.

This was an application on behalf of the plaintiff for an order to dispense with the payment of money into court as ordered, on the ground that the money had been duly paid to the solicitor of the party who would be entitled to it, if paid in.

SPRAGGE, V. C.—The money is paid to the plaintiff's solicitor not to the plaintiff himself; if paid into court it could not be paid out to the plaintiff's solicitor, and therefore payment to him cannot be a ground for excusing payment into court.

Application refused.

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McKAY v. REED.

*Form of mortgage given under direction of the court—Practice as to settlement thereof.*

In a suit by a vendor for specific performance, where the vendor is ordered to execute a deed, and the vendee to execute a mortgage, *semble*, that it would be improper to insert a power of sale in such mortgage, and *quare* if the deed merely contains qualified covenants whether the mortgage should contain any others. Where a mortgage has been settled by a master and the party ordered to execute it objects to its form, it is not a proper mode of raising such objections, to refuse to execute such mortgage, and to execute a mortgage differing from the one settled.

In this case the defendant had been ordered to execute and deliver to the plaintiff, or execute and deposit with the master at Hamilton, a mortgage to be settled by the master. A mortgage had been settled, and the defendant had executed and deposited with the master a mortgage differing from the one settled, and now an application was made for an order to commit the defendant for contempt, in support of which was read a certificate from the master at Hamilton, to the effect that the mortgage deposited differed in several important particulars from the mortgage settled by him. Before granting the order his honour V. C. *Spragge* required to

see both mortgages, after inspection of which he delivered the following judgment on the 2nd July, 1864:

SPRAGGE, V. C.—The master certifying that the defendant had deposited a mortgage in his office executed, but not the one settled by him, but differing from it in important points, I sent for the mortgage deposited and compared it with the one settled; the latter contains a power of sale and a very stringent one too; I think it ought not to contain any power of sale. It also contains absolute covenants for title, the mortgage being for purchase money, and the deed from the vendor containing qualified covenants, the propriety of this is also questionable, though there is some authority in its favour. The two mortgages differ in these points. The defendant has not taken the proper course to raise the question which is right. He must obey the decree of the court and execute the mortgage settled by the master, but as he has shewn a willingness to execute such a mortgage as he is advised is a proper one, I think it right not to conclude the question against him. The proper order I think will be that he execute the mortgage settled by the master within one month, and that it remain deposited till the 1st October, in order to enable the defendant to raise the question as to the propriety of the mortgage settled. If the settling of the mortgage be not disturbed by the court in the meantime, the mortgage to be delivered to the plaintiff; if not executed in a month, the order for commitment to go.

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RAE V. SHAW.

*Final order of foreclosure—Affidavit in support.*

Where the plaintiff in a foreclosure suit resides out of the jurisdiction, and an application is made for a final order of foreclosure, the affidavit of non-payment being made by an agent of the plaintiff, it must be shewn where the custody of the mortgage has been.

This was an application for a final order of foreclosure. The plaintiff was resident in England, and the usual affidavit of non-payment was made by an agent here under power of attorney. It did not shew however who had had the custody of the mortgage deed.

SPRAGGE, V. C.—The affidavit of the agent does not shew where the mortgage has been in the meantime, it may be in the hands of another agent of the plaintiff who may have received the money, you must shew where the mortgage has been; if you can produce an affidavit shewing it to have been with you the order may go.

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NOTE.—The same point was decided on the same day in *Sturdey v. Lowrey*.

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### DICKSON v. COOK.

*Breach of injunction—Costs of contempt—Attachment.*

An attachment to commit a party for contempt will not be granted merely for non-payment of the costs of the contempt.

In this case an injunction had been granted restraining the defendant McDonald from cutting timber. This injunction had been disobeyed, and an attachment had been obtained against him; he had moved to discharge the order for attachment, which was refused; it was, however, ordered that the attachment should not be put in force without leave first obtained on notice. It appeared that the defendant was no longer in contempt except as to the costs of the contempt, which he had not paid, and *Hoskin* now moved for leave to put the attachment in force.

*Patterson*, contra, read an affidavit of the defendant McDonald shewing his inability to pay the costs; and he contended that the plaintiff had no right to process of contempt merely for the non-payment of costs, as such would be in manifest contravention of the statute.

SPRAGGE, V. C.—The difficulty which I felt at the hearing of this application remains with me. It is true that by granting it I should only be carrying out the manifest intention of another judge, and it is also true that it was competent to the court to commit for breach of the injunction, or to fine the party guilty of it; but if the fine was only another name for costs or a money compensation to the plaintiff, I apprehend it might be open to the same objec-

tion under the act. Here the attachment was allowed to stand until certain timber should be removed and certain costs paid, and it was ordered that it should not be put in force without the leave of the court, such leave is now asked for, and the ground laid is that the costs are not paid. It does appear to me that this would be in substance, granting process of contempt for non-payment of costs, and so against the spirit, if not the very letter, of the 13th section of the act. If the point is doubtful, (and I take it to be so, inasmuch as at least one other judge of the court thinks that process of contempt may properly issue in such a case,) I think I ought to incline in favour of the liberty of the subject. I refuse the application, but, under the circumstances, without costs.

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### McROBERTS V. DURIE.

#### *Opening biddings.*

One lot of land out of several sold under order of the court was purchased for £79 5s.; after the sale another person came into the office of the plaintiff's solicitor and offered £100: an application by the plaintiff made under the circumstances to substitute the latter person for the purchaser refused with costs. The practice as to opening biddings commented upon.

In this case several lots of land had been sold under the direction of the court, for between £400 and £500, the plaintiff's claim amounting to about £1400. One of the lots had been sold to a purchaser at the sale for £79 5s. Shortly after the sale another person attended at the office of the plaintiff's solicitor, and offered to purchase the same lot for £100, and the plaintiff now asked for an order to substitute the latter person for the former as purchaser.

VANKOUGHNET, C.—I do not know of such a practice, nor do I think I can make one. I have no desire to extend the practice as to opening biddings, as I consider it a mistake and very prejudicial. No person would attend at sales under the direction of this court if it were known that a party might come the next day and by offering a few pounds more obtain the property. I dismiss the application with costs.

## SHINNERS V. GRAHAM.

*Court application—Abatement of purchase money.*

An application by a purchaser in a suit for specific performance for abatement of purchase money on the ground of outstanding dower should be made in court and not in Chambers.

This was a suit for specific performance, and *Crickmore*, for the plaintiff, asked for an order for the abatement of the purchase money on the ground of outstanding dower.

*Ward* for the defendant.

**SPRAGGE, V. C.**—How is it you apply in Chambers? What you ask should, I think, have formed part of the original decree. In the case of a purchase under the decree of the court an application of this kind would properly be made in Chambers, but not in a suit for specific performance.

Adjourned into court.

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## GIRDLESTONE V. GUNN.

*Foreclosure after abortive sale.*

Where a foreclosure is asked after an abortive sale, the mortgagor must first be allowed three months to redeem.

**G. M. Rae** asked for a final order of foreclosure against both defendants. The master's certificate shewed that the sale had proved abortive for want of bidders. He cited *Andrew v. Ward*, before *Esten, V. C.*, February 4th, 1864.

*Burton* appeared for one of the defendants, and consented that the order should go against him. The other did not appear.

**VANKOUGHNET, C.**—The order absolute can go at once against the defendant who consents, but I am afraid as against the other party only the usual order can be drawn up, giving him three months to redeem, or, in default, foreclosure.

Ordered accordingly.

## BULLEN v. RENWICK.

*Payment out of court.*

An order for the payment of money out of court will not be made *ex parte*, the party who has paid it in must be served with notice.

*Snelling*, for the defendant, for order for payment out of court of the money paid in by the plaintiff, being the mortgage money of the property in question in the suit. It appeared that the plaintiff had duly executed a re-conveyance as required by the decree, and had applied to the plaintiff for his consent to the payment out of court, which was refused, on the grounds that no memorial had been executed, and the wife was no party to the deed, both which objections he considered untenable.

**VANKOUGHNET, C.**—I cannot grant you the order *ex parte*, you may, however, serve short notice for to-morrow.

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## SPRAGUE v. HENDERSON.

*Time for service—Sunday.*

Service of a paper effected after the hour of four o'clock, by putting it under the door of a solicitor's office, is not a good service for that day, unless it be shewn that the paper came to the hands of the solicitor or his clerk on that day, during such the hours as which the one or the other might be served personally. When Sunday is an intermediate day it is reckoned in the computation of the time for service of papers.

*Hodgin* moved to quash a master's certificate under the following circumstances. Notice had been served at the office of McDonald & Howard, at 5.30 p. m. on a Saturday, of a cross-examination to take place on the following Tuesday before a master. The master decided that the intervening Sunday was not to be computed, and that therefore the solicitor had not received the forty-eight hours' notice required by the general orders, and (the party not attending) had certified that the notice was insufficient. This certificate was now sought to be quashed. In support of the proposition that *Sunday was to be reckoned*, Mr. *Hodgin* cited Order V., sec. 3; Order XL., sec 9; Brewster v. Thorpe, (11 Jur. 6;) McIntosh v. G. W. R. Co., (1 Hare 328;) *In re North*

Wheal Exmouth Mining Co., (8 Jurist N. S. 1168;) and as to the service being good as of Saturday Newland, Ch. Pr., 43; Rayner v. Hodges, (1 Dowl. N. S. 863;) Burdett v. Lewis, (7 C. B. N. S. 791;) Grant v. McKenzie, (1 Ex. 12;) Chitty Arch. (11 Ed.) 164.

*Howard* contra.

VANKOUGHNET, C., held that Sunday, when an intermediate day, was to be computed equally, whether the notice required was forty-eight hours, or two clear days. As to the service on the Saturday being good as of that day, after remarking that he thought it unreasonable to expect a solicitor or his clerk to remain in his office till 5.30 p. m., for the purpose of receiving papers; after taking time to look into the authorities cited, his lordship stated he was of opinion that leaving a paper for service at a solicitor's office after four o'clock, p. m., is not good service for that day, unless it can be shewn that it came to the hands of the solicitor or his clerk on that day during such hours as the one or the other might be served personally."

Motion refused with costs.

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WINTERS v. KINGSTON PERMANENT BUILDING SOCIETY.

*Leave to re-hear after six months from decree.*

This court will, by analogy to cases of appeal, in a proper case grant leave upon terms to re-hear a cause, though the usual time therefor has elapsed.

*R. Sullivan*, on behalf of the society, moved for leave to set down the cause for re-hearing after six months from the date of the decree, and for a stay of proceedings under the decree, the society being ordered to pay over money.

*S. H. Blake*, contra, for the plaintiff, cited Herring v. Clobery, (12 Sim. 410,) Waldo v. Caley, (16 Ves. 214, 215,) Archer v. Hudson, (8 Beav. 321,) as to the staying of proceedings, *i.e.*, the payment of the money and costs decreed.

*Foster*, for other defendants, contended that if the plaintiff was entitled to costs that they were also.

SPRAGGE, V. C., remarked that the Appeal Act had altered the practice with regard to appeals, and that the court must act on the same principle with regard to re-hearings, in obedience to the spirit of the act in cases analogous to those with which the statute deals, and his honour, after taking time to look into the cases cited, stated that he had no doubt it was the *bonâ fide* intention of the building society to re-hear; the cause was not set down through the mistake of the young gentleman acting for their solicitor; I think it should now be allowed to be set down upon terms. The sum to be paid to the plaintiff was to be invested for the benefit of infants in bank stock, which, it is said, and not denied, yields eight per cent. per annum, the difference between the interest allowed in court, and the above for three months from this time should be paid into court; also the costs.

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#### IN RE MILLER, AN ALLEGED LUNATIC.

Before granting an order declaring a person a lunatic, he must be served with notice of the application, and any counsel, or other person he may desire to see in relation to the matter, must be allowed access to him.

*Ferguson* applied for an order to declare a person a lunatic, and to appoint a committee of his person and estate. He read a number of affidavits from relatives and medical men, tending to shew the state of mind of the alleged lunatic, but who it appeared had received no notice of the application.

SPRAGGE, V. C.—The affidavits are very strong, and leave no reasonable doubt as to the alleged lunatic being of unsound mind; but he ought to have notice, and any persons, counsel or others, whom he may desire to see in reference to this application must have free access to him.

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## COULSON v. SHEEHEY.

In a suit for sale of mortgaged property, an incumbrancer had proved a claim against the property, the plaintiff, (the mortgagee,) who had been paid in full having died, *held*, on an application by such subsequent incumbrancer for the usual order for redemption and foreclosure after an abortive sale, that it was unnecessary to revive the suit.

*S. H. Blake*, on behalf of Street, a subsequent incumbrancer, asked for the usual order for redemption or foreclosure after an abortive sale. It appeared that the plaintiff had been paid in full, and had died, and

*Sampson*, contra, who had been formerly the plaintiff's solicitor, submitted that a revivor was necessary.

*S. H. Blake*, in reply, cited White on Revivor and Supplement, 77; *Jones v. Williams*, 1 C. P. Cooper, 488.

SPRAGGE, V. C., decided, on the authority of the case cited, that as the plaintiff had no interest, it was not necessary to revive, and that the order might go as asked.

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## BOULTON v. McNAUGHTON.

*Order pro confesso ex parte—Costs.*

The six months after service of the bill, within which an order *pro confesso* may be obtained *ex parte*, are six calendar months. Where separate affidavits of service of bill are made by one person, the costs of one only should be allowed.

This was an application for an order *pro confesso* against four defendants, who had been served on the 22nd, 23rd, 24th and 28th December, 1863, respectively. Four separate affidavits of service had been sworn to by the same bailiff.

SPRAGGE, V. C.—Take the order. There was no necessity for four affidavits of service; the costs of one only should be taxed.

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## ANNIS v. WILSON.

*Final order for foreclosure.*

Where co-mortgagees are made co-plaintiffs in a foreclosure suit, the affidavit as to non-payment, on which to obtain a final order of foreclosure, should be made by all of them.

*Stephens* for final order of foreclosure. It appeared that there were two plaintiffs, executors of the mortgagee, and the affidavit as to non-payment had been made by only one of them.

**SPRAGGE, V. C.**, directed an affidavit of non-payment of the other plaintiff to be produced, saying that such was always required, as either of the plaintiffs might have received the money. On production of the affidavit the order to go.

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## HARPER v. HARPER.

*Death of guardian ad litem.*

Where a guardian *ad litem* dies a new one may be appointed without notice.

*D. Boulton* moved *ex parte* for an order to appoint a new guardian *ad litem*, the former one having died.

**SPRAGGE, V. C.**—Where a guardian *ad litem* dies I believe a new one may be appointed without notice. Take the order.

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## CAMERON v. VAN EVERY.

*Motion to dismiss for want of prosecution.*

A motion by the plaintiff for leave to amend having been refused, the plaintiff had moved to discharge the order refusing leave to amend, *held* that a motion to dismiss, pending the motion to discharge the order, was irregular.

It appeared that the plaintiff had moved for leave to amend his bill; that the motion had been refused by his lordship the Chancellor, and that a motion to discharge his lordship's order was now pending, and a motion was now made to dismiss for want of prosecution.

*Cameron, contra.*

VANKOUGHNET, C.—I will not dismiss the bill pending a motion to discharge my order, as it may be that the order is wrong.

Motion refused.

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### HARVIE v. FERGUSON.

*Motion to dismiss for want of prosecution—Costs of prior motion.*

A motion to dismiss for want of prosecution had been refused with costs. Held that another motion to dismiss could not be made till the costs of the prior one were paid, though it appeared that the plaintiff's solicitor had not taken out his certificate.

*Kennedy* moved to dismiss the plaintiff's bill for want of prosecution.

*S. H. Blake*, contra, objected that the costs of a prior motion to dismiss, which had been refused with costs, had not been paid, as settled by the order made on the motion.

*Kennedy*, in reply, stated that the plaintiff's solicitor had not taken out his certificate in the Court of Chancery, and that it would not therefore be safe to pay the costs to him; and further that the costs on the same ground had been wrongly taxed, as, the solicitor not having taken out his certificates, the plaintiff could not be entitled to any thing except disbursements.

VANKOUGHNET, C.—You should have paid the costs to the plaintiff himself; as to the amount of the costs, I cannot go behind the order, and am afraid therefore that I must refuse the motion, although I am very reluctant to keep a bill on the files which has been there since 1861. It has always been held that before an application is made the costs of a former one as to the same matter should be first paid.

Order refused with costs.

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## COMMERCIAL BANK v. ELWOOD.

*Costs—Set-off.*

The practice at common law with respect to the set-off of one defendant's costs against those of another, for the benefit of the plaintiff, does not prevail here. Nor can a plaintiff set-off costs payable by one defendant against that defendant's share of the joint costs of defence in the same suit, all defendants being represented by the same solicitor.

A bill was filed against Elwood and another, to which Elwood alone demurred, and his demurrer was overruled with costs. Afterwards the bill was amended by adding two other defendants. The bill having been eventually dismissed for want of prosecution, it was now sought by plaintiffs to set-off the costs of the demurrer against Elwood's portion of the joint costs of defence. All the defendants appeared by the same solicitor. The master refused to set-off those costs as asked by plaintiffs, and the matter was referred to Chambers by consent.

*Foster*, on behalf of the plaintiffs, contended that the general rules applicable in ordinary cases of set-off are not to be strictly followed where the question arises as to costs in the course of a suit; but that the court will act under its general jurisdiction over its own suitors.—*Mitchell v. Oldfield*, (4 Term Rep. 123.) The decisions at common law are under the equitable jurisdiction of the common law courts, and are clearly in favour of the plaintiffs.—*Schoole v. Noble*, (1 H. Bl. 23,) *Norman v. Climenson*, (4 M. & G. 243,) *Starling v. Cozens*, (3 Dowl. 782,) *Redway v. Webber*, (32 L. J. C. P. 84.) Costs of defence are divisible though the parties appear by the same solicitor.—*Ridgway v. Webber*, (7 L. T. N. S. 385,) *Griffiths v. Kynaston*, (2 Tyr. 757,) *Griffiths v. Jones*, (2 C. M. & R. 333.) The lien of the solicitor is only on the balance of costs after the equities between the parties are arranged.—*Taylor v. Popham*, (15 Ves. 72, per Lord Eldon,) *Jenner v. Morris*, (11 W. R. 943,) *Hannon v. Hannon*, and *Wilson v. Switzer*, (ante, page 160,) are distinguishable.

*Snelling*, contra, cited *Holworthy v. Mortlock*, (1 Cox 202,) *Smee v. Baines*, (7 Jur. N. S. 902.)

VANKOUGHNET, C.—I can find no practice in equity similar to that established by the rule of court now in force at common law, for the set-off of one defendant's costs against those of another, for the benefit of the plaintiff. It does not seem to me to be equitable that such a practice should be adopted, and not finding any authority for it in this court, I do not introduce it. The cases of Wright v. Chard, (4 Drew. 702,) and Jenner v. Morris, (11 W. R. 943,) go to shew that no such practice prevails here. In the present case one of the defendants demurs, the demurrer is overruled with costs; the co-defendant had nothing to do with this demurrer, but afterwards he and the other defendant answered, and eventually the plaintiffs' bill is dismissed as against them with costs; against this joint bill of costs the plaintiffs seek to set-off the costs awarded to them against the defendant who demurred. If this be done, the other defendant, who had nothing to do with the incurring of these costs, will owe his solicitor just so much more, and cannot, in this suit, at all events, recover that amount from his co-defendant, against whom, on the other hand, the plaintiff can proceed in this suit by execution for his costs. In many cases it would be not only most unjust, but might be impossible to apply the rule at law where there are so many diverse interests and rights brought together, as is frequently necessary in a suit in this court.

Motion refused, with costs.

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### CROOKS v. STREET.

#### *Lien of attorney.*

A deed ordered to be executed under a decree of the court was sent by the solicitor of the vendor, after being executed by him, to the defendants for the purpose of being executed by them; which they accordingly did in the presence of an attorney employed by them for that purpose: *held*, that such attorney was not entitled to a lien upon the conveyance so executed for any amount beyond his disbursements, and for preparing the affidavit of execution.

The purchase money of lands sold under the decree having been duly paid into court, the master settled and approved of a deed of conveyance to the purchaser, which was there-

upon delivered to the solicitor of the vendor to be executed. The granting parties to the deed consisted of the vendor (one of the plaintiffs) and several of the defendants. After the deed had been executed by the vendor, his solicitor sent it to the defendants for execution, and they executed it accordingly, having employed Mr. Smart, an attorney, to attend to and witness the execution thereof by them. After the deed had been executed it was given by the defendants to Mr. Smart, to be delivered to the vendor's solicitor, but Mr. Smart retained the deed, claiming a lien thereon for £7 5s. 9d., the amount of his costs and charges in attending to its execution, and he refused to deliver it, notwithstanding the vendor's solicitor tendered him £1 5s., a sum which Mr. Smart admitted was sufficient to cover his disbursements in the matter.

The vendor presented a petition, praying that Mr. Smart might be ordered to deliver up the deed forthwith to petitioner, and to pay the costs of the application.

*Morphy*, for petitioner, cited Stokes on Liens, (20, 21, 59, 78, and 81,) *Pelly v. Wathen*, (7 Hare, 351,) *Ex parte Hudson*, (2 Deac. & Ch. 507,) *Turner v. Letts*, (20 Beav. 185,) *Baker v. Henderson*, (4 Sim. 27,) *Calvert on Parties*, 60, *note*.

*Moss*, for Smart.

**VANKOUGHNET, C.**—I do not think that Mr. Smart is entitled to any lien beyond his disbursements, and perhaps the affidavit to the memorial, and fifteen shillings will cover all that, according to his own affidavit. He was acting for the defendants, and could not claim any lien on the plaintiffs' deed, which he must deliver up, paying the costs of this application, less the fifteen shillings so allowed to him.

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## IN RE FAIRBANKS, A SOLICITOR.

*Taxation of costs at instance of client.*

Where a solicitor had been employed to conduct a suit, and otherwise rendered professional services for the client, and without furnishing a bill of costs, a demand was made for £45, which was compromised by the client giving his promissory note for £40, which note was renewed and ultimately paid, a motion by the client, after a lapse of eleven months, for an order directing the solicitor to furnish a bill of costs, and to refer the same for taxation, was refused with costs.

This was an application by *Foster* for an order to compel Mr. Fairbanks to furnish a bill of costs and charges, and to refer the same for taxation under the circumstances stated in the head note and judgment, citing *In re Barrow*, 17 Beav. 560.

*Fitzgerald*, contra.

VANKOUGHNET C.—In this case the petitioner swears that no bill of costs was ever delivered to him for work done by the solicitor; that he was not aware that he was entitled to receive such a bill; that the solicitor had conducted a foreclosure suit for him, and that he asked him at its termination what he owed him, when the solicitor demanded from him £45; that he offered and gave his note for £40, which was accepted in payment; that this note was renewed and finally paid. In answer, the solicitor and his clerk swear that besides the costs of the foreclosure suit, the solicitor did other work for the petitioner, who had been frequently in the habit of consulting him professionally, and that this note was made in discharge of all services rendered him. This allegation is not answered by the petitioner. No specific overcharges in the costs of the foreclosure suit are pointed out. It could very easily have been ascertained from the proceedings in court what the charges ought to have been, and the petitioner might, if he could, have denied that services were rendered to him otherwise than in that suit. *In re Barrow*, the Master of the Rolls, who appears to have had more experience in such matters than any other judge, says, “I certainly have shown no disposi-

tion to open a settled account, or to refer to taxation the bill of a solicitor once paid. I have thought that the doctrine of pressure ought not to be extended, and that without it mere overcharges, even though gross, which the client might have detected before payment, should not induce the court to take this course, and above all, I have considered it incumbent on the petitioner to come speedily." Here there was no pressure—no gross overcharges are shown. The solicitor says, "Give me £45 for all the work I have done for you." The client proposes to give his note for £40, which is accepted, and now, more than eleven months after this transaction, he comes to the court and asks for a bill of charges. I think he is not entitled to it. It does not appear that he is an illiterate or ignorant man, and one can hardly believe that he did not know he was entitled to a bill of items, or an account. I do not approve of this mode of settling accounts. It is much more satisfactory that the solicitor should prepare and deliver his bill, but if the client, satisfied with his solicitor's services, chooses, instead of demanding this, to pay him a round sum in full of all demands, he must make out a case of fraud in the solicitor so as to induce the court to interfere. No one is more disposed than I am to protect a client from imposition, but a solicitor is not presumed to be wrong, and to be hunted down, merely because as such he holds a position which may sometimes be abused.

Application refused with costs.

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#### HODKINSON v. FRENCH.

*Delivery of possession after final order.*

On an application against a mortgagor to deliver possession of the mortgaged premises after a final order for foreclosure, it must be shewn that the mortgagor is actually in possession.

This was an application on notice for the usual order for the delivery up of mortgaged property after final order for foreclosure against the mortgagor. No affidavit was filed, however, to show that the mortgagor was in possession.

SPRAGGE, V. C.—You must show that the mortgagor is in possession, and may produce a further affidavit for that purpose.

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IN RE DANIELL, A SOLICITOR, &c.

*Taxation of a solicitor's bill of costs.*

The common order to tax a solicitor's bill of costs may be obtained by a client on *præcipe*, it is not necessary to apply to a judge in Chambers for it.

This was an application on behalf of Beddome, a client, for the usual order for the taxation of his solicitor's bills of costs.

SPRAGGE, V. C.—The common order may be had by the client on *præcipe*.

Order refused.

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WEIR v. MATHESON.

*Examination of party—Application to commit.*

An application for an order that a party to a suit do submit to be examined at his own expense, or in default be committed, will not be granted *ex parte*, notice must be served. The right to examine a party to the cause is not affected by No. ii. of the Orders of 10th January, 1863.

The plaintiff had been served with a subpoena, requiring him to attend before a master to be examined, which he had not complied with, and now *McLennan*, on behalf of the defendants, moved *ex parte* for an order that the plaintiff do submit to be examined at his own expense, or be committed, citing Order xxii., secs. 1, 5, and 7. He read a certificate from the master, shewing the plaintiff's default.

SPRAGGE, V. C., declined to grant such an order *ex parte*, and directed notice to be served.

Subsequently notice having been served as directed, *McLennan* renewed the application.

*Cattanach*, contra, cited Order ii. of 10th January, 1863,

and Barton v. Lewis, referred to at pages 99 and 133, Taylor's Orders.

SPRAGGE, V. C.—I think the general order xxii. remains in force, and that the right to examine is not affected by the Order of 10th January, 1863. Order to go for plaintiff to attend at his own expense, and be examined, and to pay costs of application.

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### POWERS v. MERRIMAN.

*Final order for foreclosure.*

On an application for a final order for foreclosure, where the affidavit of non-payment of the mortgage money is made by an agent of the plaintiff, it should state that he is authorised to receive the money.

Hamilton, for a final order for foreclosure. The usual affidavit as to non-payment was made by an agent of the plaintiff, which showed that he was authorised to bring the suit, and to act as the agent of the plaintiff therein, and also that the agent had had the custody of the mortgage deed throughout, but it did not state that the agent was authorised to receive the mortgage money.

VANKOUGHNET, C.—The affidavit does not show that the agent is authorised to receive the money. If he has no such authority a payment to him would not discharge the mortgagor if the agent misapplied the funds, and did not pay them to the mortgagee.

Order refused.

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NOTE.—A similar decision was given a few days subsequently by his Honor Vice-Chancellor Spragge, in Mitchell v. Livingston.

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### McKERCHIE v. MONTGOMERY.

*Subpœna to examine witness residing in Lower Canada.*

The court has authority to grant an order for a subpœna to issue to Lower Canada, though the evidence of the proposed witness is not intended to be used at the hearing of the cause.

This was an application for an order for a subpœna *ad test* against a witness resident in Montreal, to attend and be

examined before a deputy master in Upper Canada, the evidence to be taken not with a view of being used at the hearing. Con. Stat. Can. chap. 79, sec. 4; order of 6th April, 1857, and Order xl., sec. 7, Taylor's Orders, page 133, were cited.

SPRAGGE, V. C.—I think this case within general order 40, sec. 7, and the provincial statute above referred to, and the affidavits and depositions shew it to be a proper case for the order asked for.

Order to go.

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IN RE LASH, A TRUSTEE.

*Appointment of new trustee.*

An application by petition (without suit) for the appointment of a new trustee under Imperial Act, 13 and 14 Vic., ch. 60, should be made in court, and not in chambers.

This was an *ex parte* application by *Howard*, on petition of the Bank of British North America, for the appointment of a new trustee in place of William Lash. It appeared that a conveyance had been made by one Read to William Lash, as trustee for the Bank, and that Lash had since died, leaving several children, one of whom, the eldest son, was resident in the Island of Java. The bank had found a purchaser for the property, but could not convey it without the concurrence of the heir of the trustee, in Java, to obtain which would cause great delay, and probably prevent the proposed sale.

The following authorities were referred to, in support of the application: Imperial Act, 13 and 14 Vic., ch. 60, secs. 9, 38, 40; Consol. Stat. U. C., ch. 12, sec. 26, sub-sec. 10; *In re Willan*, (9 W. R. 689,) *In re Tweedy*, (9 W. R. 398,) *In re Ryan's settlement*, (9 W. R. 137.)

SPRAGGE, V. C.—That which is sought is in effect a decree appointing a new trustee, and for which a bill has been necessary, the application should therefore be made to the court; the case of partition upon petition is analagous.

The Imperial Statute, I incline to think, applies, but that question will be open upon the application to the court. I think Read, the author of the trust, should be served with the petition. It will be for the court to say whether it will dispense with service upon the heir of the trustee.

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NOTE.—The application was afterwards made in court by *Proudfoot*, when the court dispensed with service on both Read and the heir of the trustee, and granted the order as asked.

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### THE WESTERN ASSURANCE Co. v. CAPREOL.

#### *Final order for sale.*

On an application by a company for a final order for the sale of mortgaged property, the affidavit of the officer of the company as to non-payment should shew that he is the proper officer to receive the mortgage money.

This was an application for a final order for the sale of mortgaged property, the affidavit of non-payment of the money found due, made by the secretary of the company, did not shew that he was the proper officer to receive the money, and

SPRAGGE, V. C., required a further affidavit to be made shewing that fact, on production of which the order was allowed to go.

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### MOFFATT v. WHITE.

#### *Delivery of possession after final order—Ejectment suit pending—Election.*

The fact that an ejectment suit has been brought by the mortgagee, and is pending, is no bar to obtaining the usual order for possession after final order for foreclosure, but in such case the order will be granted only on the terms of discontinuing the action at law, and paying the costs of it. A delay of two years after the final order for foreclosure is no bar to obtaining the usual order for possession.

This was a mortgage suit in which the defendant Grimshaw, a subsequent mortgagee, had redeemed the plaintiff, and carried on the suit for his own benefit, and obtained a final order against White, the mortgagor.

The final order had been obtained about two years previously, and now *Crickmore* moved on behalf of Grimshaw for the usual order for delivery of possession, under Order xxxii., sec. 1.

*Hector Cameron*, contra, alleged that an ejectment suit had been commenced by Grimshaw against the defendant, which was now pending, and he contended that having chosen his forum, the plaintiff had no right to come to this court, and that the great delay which had taken place debarred the applicant from this remedy.

*C. S. Patterson*, in reply, cited *Evans v. Bremridge*, (2 Jur. N. S. 311,) to show that the pendency of an issue at law did not affect the jurisdiction of this court.

**SPRAGGE**, V. C., at the conclusion of the argument, said that he thought there was nothing in the claim of tenancy set up by the defendant, either under the provision for entry contained in the mortgage, or the common law order for the re-delivery of possession, and that he would have felt no difficulty in ordering delivery of possession if the plaintiff had not taken proceedings at law for the recovery of such possession. His Honor desired to consider that point, the plaintiff submitting to such order as to the proceedings at law as the learned judge might see fit to make. Subsequently his Honor stated that if the proceedings in this court were by bill for some cause of suit in which this court and the common law courts had concurrent jurisdiction, the plaintiff would merely be put to his election; the question is, whether a like rule should prevail when the application to this court is summary under the general orders; would it in such a case be an answer that he had chosen his forum, when it would not be an answer if the proceedings were by bill. His Honor thought the analogy was in favour of putting the party to his election, and if he were willing to discontinue his proceedings at law, and pay the defendant's costs, he thought he might properly have his order in this court. The discontinuing of the action and the payment of costs should be preliminary to his having his order.

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NOTE.—This case was afterwards brought before the full court on appeal, when the judgment of his Honor was affirmed.

## HARRIS v. MYERS.

*Contempt—Non-payment of money ordered—Practice.*

The court will not detain a person in gaol merely for the non-payment of money; but in order to punish any one who has been guilty of a contempt of court, it may imprison him for a stated period, allowing him to be discharged if he pay the costs of his contempt before the expiration of such period.

The court will entertain applications affecting the liberty of the subject during long vacation

Poverty is no excuse for delay in making an application to the court, as in such case the party can apply *in formâ pauperis*.

*Spencer* applied on the 1<sup>st</sup> September, 1864, for an order to release the defendant from custody, and to discharge the order for his arrest. It appeared that an order had been made by his Honor Vice-Chancellor *Esten*, directing the defendant to pay certain past due rents to the receiver appointed in the cause, and also to execute to such receiver a deed of attornment, to secure the payment of accruing rents, or in default that he should be committed. The defendant had disobeyed this order, and had been committed to gaol, where he had been since the 27th May, 1864. It was alleged that the decree directed the defendant to pay the past due rents, but did not direct him to execute any deed of attornment, and counsel contended that the order granted by his Honor Vice-Chancellor *Esten* was therefore wrong, it being in reality, in respect to the direction to execute the deed of attornment, an order *nisi*, not founded on any previous order, which he contended was clearly irregular by analogy to the ordinary mode of enforcing production, as to which an order *nisi* was never granted without a previous order to produce being taken out and served. He contended that the order was therefore good only as concerned the payment of the past due rents, and as to that, the defendant could not be detained in gaol, as it would be contrary to the statute. He also contended that the defendant had a right to have the deed of attornment settled under the direction of the court.

*Hodgins*, contra, urged that the defendant had been guilty of great laches in moving against the order.

*Spencer*, in reply, excused the delay on the ground that

long vacation had intervened, and that the defendant was too poor to pay fees to get his discharge.

VANKOUGHNET, C., said that the intervention of long vacation was no excuse for the delay, as the court would always hear applications affecting the liberty of any one during vacation, nor could the court listen to the plea of poverty, as the party can in such case come to the court *in forma pauperis*. But apart from any delay in the matter, his Lordship declined to enter into the merits of the order made by his Honor Vice-Chancellor *Esten*, as he could not review that order, the proper course to do so being an appeal to the full court. His Lordship then said he would make an order discharging the defendant upon his executing the deed of attornment, without keeping him any longer in gaol for the non-payment of the rents, remarking that the court will not now put or detain a person in gaol merely for the non-payment of money, but that where a person has been guilty of a contempt which he has cleared without paying the costs of it, the court may order him, as a punishment for his contempt, to be imprisoned for one, two, or three months, or longer, according to the magnitude of his offence, unless he, before the expiration of the time limited, pay the costs of his contempt, upon which he would be discharged. In this case his lordship thought that the defendant had been punished enough already, and would allow him to be discharged upon his executing the deed of attornment, giving the plaintiff the same right as if executed within the time appointed, the plaintiffs to have their costs, to be obtained by *fit. fa.* in the usual way.

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#### BAXTER V. FINLAY.

*Advertisement for sale—Puffing.*

Advertisements for sales under the direction of the court should be as short as possible; the short style of the cause and a short description of the property and improvements is sufficient, and no merely formal parts, such as convey no information to intending purchasers, should be inserted therein. The practice of puffing animadverted upon.

This was an application for a vesting order of property

in which infants were concerned. *Taylor contra*, for the infants, alleged that no notice had been given to them of the settlement of the advertisement and other proceedings in the master's office.

VANKOUGHNET, C., decided that the want of notice to the guardian vitiated the sale, and that there must therefore be a re-sale: and as to the advertisement, his Lordship remarked that the mode in which advertisements were drawn up was very much longer than there was occasion for, so as unnecessarily to increase the expense of the suit without any benefit to any one concerned. His Lordship said it was quite sufficient to insert the short style of cause, and that it was unnecessary to describe the property by metes and bounds, as the court always recognized a description such as "lot A, in the first concession," as a legal description. His Lordship also animadverted upon the practice of puffing, which he had noticed in several advertisements. He said it was proper that an advertisement should contain a truthful description of all improvements on the property, such as buildings, &c., but that anything like puffing was very improper. His Lordship also said that he had directed the master here to settle advertisements in the manner indicated, and had also instructed the registrar to send similar directions to the deputy masters throughout the country, but that notwithstanding, he had a short time since seen an advertisement in which the style of the cause occupied the half of a column of a newspaper.

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NOTE.—His Honor, *V. C. Spragge*, in settling an advertisement for sale in *Buchan v. Wilkes*, on the 25th June, 1864, struck out the dates of the decree and final order, and other formal parts, as being unnecessary and conveying no information to intending purchasers. It is presumed that, in conformity with these decisions, solicitors and deputy masters will frame and settle advertisements for sale accordingly.

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## BERKIS v. NICHOLS.

*Service of bill by publication.*

In a suit which is not for foreclosure or specific performance, the court cannot order service of the bill by publication on defendants, who have been out of the jurisdiction for more than two years before the filing of the bill.

*W. H. C. Kerr* moved for the usual order to serve the defendants (two in number) by publication. It appeared that one of the defendants had left the province 23 years ago, that the other had never been in it, and that neither could be found to be served with the bill. The suit was to set aside a patent issued by mistake.

*SPRAGGE, V. C.*, said, if the court had thought it proper to act against defendants under such circumstances, they would have made an order for that purpose. The orders do not apply against these defendants, but only (in a suit of this kind) where the defendants have been in the jurisdiction within two years prior to the filing of the bill.

Order refused.

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## WALKER v. MATTHEWS.

*Order for delivery of possession and of title deeds to a purchaser after sale.*

Where an application is made by a purchaser for an order against a mortgagor for the delivery of possession of the property, and of the title deeds, notice must be served on the plaintiff, (the mortgagee,) or, if he be paid off, to some other party interested in the proceeds of the sale.

This was an application by *Burns* on behalf of the purchaser of the property sold in the cause (who was also a defendant) for an order for the delivery of possession of the property by the mortgagor and of the title deeds in his custody. Notice had been served on the mortgagor only.

*SPRAGGE, V. C.*—Is not the plaintiff entitled to notice? Applications of this kind are usually made by the plaintiff or the purchaser; the plaintiff may have something to say. It may stand for a few days, notice to be given to the plaintiff, or if he be paid by the proceeds of the sale, then to some other person interested in such proceeds.

## McCANN v. EASTWOOD.

*Order pro confesso after two months.*

In applying for an order *pro-confesso* after two months from the service of the bill, the registrar's certificate, as to no answer being filed, should be as recent as possible.

This was an application made on Saturday, 3rd September, 1864, for an order *pro-confesso*, after two months from the service of the bill. The certificate of the deputy-registrar at Hamilton was dated the 31st of August, 1864.

SPRAGGE, V. C., said that the certificate was not recent enough, but that the order might go on the production of a new one as recent as possible.

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## MCCLARY v. DURAND.

*Order pro confesso after six months*

In applying for an order *pro-confesso* after six months from the service of the bill, the affidavit of service of the notice of motion should show that the notice was served within the jurisdiction.

F. T. Jones, for an order *pro-confesso*, after six months from the service of the bill. The affidavit of service of the notice of motion did not shew that the notice had been served within the jurisdiction.

SPRAGGE, V. C.—The affidavit should state where the service was effected, as it may have been made in Detroit. The order may go on production of an affidavit shewing service of the notice of motion within the jurisdiction.

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IN RE BABCOCK.  
MOORE v. GOULD.*Leave to serve short notice of motion out of jurisdiction.*

The court will, in a proper case, grant leave to serve short notice of motion out of the jurisdiction.

This was an application on behalf of a purchaser for

leave to serve a notice of motion for a vesting order on a party residing in Buffalo. The time given by the orders is six weeks, which was asked to be shortened to fourteen days.

SPRAGGE, V. C., granted the application as asked.

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### TAYLOR v. TAYLOR.

#### *Alimony.*

On an application for an order for interim alimony, the affidavit as to the marriage should state such particulars as to it (by whom solemnized, &c.) that the court may judge for itself whether it has been duly solemnized or not.

*Dunn* for order for interim alimony. The affidavit as to the marriage merely stated that it had been "duly solemnized in October, 1860," without giving any further particulars as to it. *Mellon v. Mellon*, before his honor *V. C. Esten*, 15th September, 1863, was cited.

*Proudfoot* contra.

SPRAGGE. V. C.—The affidavit as to the marriage is not sufficient, it should state by whom and how the marriage was effected, giving such particulars as will show the court that the parties were duly married. A supplemental affidavit, shewing these particulars, can be filed, on which the order may go.

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### WALSH v. WALSH.

#### *Alimony—Pleading.*

A bill for alimony should allege that the husband has refused to receive his wife. It is not sufficient to allege merely that they are living apart.

This was an *ex parte* application for an order for interim alimony, the bill having been taken *pro-confesso* against the husband. It appeared from the bill that the wife was residing in Canada, but that the husband had left the province and was living in the state of Pennsylvania. The bill, however, did not allege that the husband refused to receive his wife.

VANKOUGHNET, C.—The bill should allege that the hus-

band has refused to receive his wife: she is bound to live with him if he will receive her; he is not obliged to reside here because she does: it is her duty to follow him.

Order refused.

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### WOOD V. BROCK.

*Service out of jurisdiction.*

It is unnecessary to obtain an order to serve an office copy of the decree out of the jurisdiction, as No. 7, of the Orders of the 10th January, 1863, applies to the service of all proceedings in the cause.

This was an application to serve an office copy of the decree and notice A upon an incumbrancer made a party in the master's office, who was residing in the United States.

VANKOUGHNET, C.—You do not require an order to serve any one out of the jurisdiction, as the Order of 10th January, 1863, (No. vii., sec. 6,) applies to the service of all proceedings in a cause. It is only necessary to come here when you wish a shorter time for service under special circumstances.

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NOTE.—A similar decision was given previously on the 26th March, 1864, by his Honor *V. C. Spragge*, in *Widder v. Hutchinson*.

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### CUMMER V. TOMLINSON.

*Final order for foreclosure.*

Where, on an application for a final order for foreclosure, the usual affidavit of the plaintiff shews that he has been in occupation of the property, it must be referred back to the master to take a new account, set an occupation rent, and appoint a new day for payment, although the plaintiff in his affidavit swears that he has been in occupation merely as care-taker, and has received no rents or profits from the property.

This was an application for a final order for foreclosure. It appeared by the plaintiff's affidavit that the premises were in a very bad state of repair, the fences being down, and that he had gone into occupation as care-taker; but that these facts were not shewn to the master in taking the

account. The plaintiff also swore that he had reaped no benefit from the property whatever.

VANKOUGHNET, C., directed that, as possession by the plaintiff was shewn, it should be referred back to the master to take the account anew, to set an occupation rent, and appoint a new day for payment.

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### BIGGER V. BEATY.

*Guardian ad litem to infant—Service of notice.*

Where it appeared that the mother and father of an infant defendant were living apart, and that the infant had absconded and could not be found to be served with notice of application for the appointment of a guardian, the notice was directed to be served at the residence of the mother, that being the last place of residence of the infant; service on the father being dispensed with.

This was an application by *Evans* for a direction from the court as to the service of notice of an application for the appointment of a guardian *ad litem*. It appeared that the father and mother of the infant had been living apart for some time; that the infant had absconded from the province and could not be found; that he had resided with his mother up to the time of his departure, and that the bill had been served upon him by publication. Under the circumstances

VANKOUGHNET, C., directed the notice of the application to be served upon the mother at her residence, as that appeared to be the infant's last place of abode in the province, and that service on the father should be dispensed with.

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### STILSON V. KENNEDY.

*Proof of identity of party served with bill.*

The admission of a person served with an office copy of the bill, that he is the proper party named in the bill, is not sufficient proof of the identity of the person served with the defendant.

This was an application for a direction to the registrar to draw up the usual foreclosure decree on *præcipe*, the bill

having been served on a defendant out of the jurisdiction. The only proof of identity offered was the affidavit of the person who served the bill, who swore that the person served had, when served, admitted to him that he was the defendant to the suit.

SPRAGGE, V. C.—The affidavit is defective. It has never been held sufficient proof of identity that the person served admits that he is the defendant. He might not really be the defendant, but have been tutored to answer the question in the affirmative, for the purpose of misleading the plaintiff.

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NOTE.—A similar decision was given by his Honor subsequently in the case of *Burnham v. Short*, and his Honor then remarked that in these cases the bill should be served by a person who knows the defendant, by which any doubt as to his identity would be obviated.

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### BARRY v. BRAZILL.

*Guardian ad litem to infant in administration suit.*

It is no bar to the appointment of a guardian *ad litem* to an infant defendant, in an administration in chambers by motion, that the application for guardian is made before the return of the notice of motion for the usual administration order.

This was an application for the appointment of a guardian *ad litem* to the infant defendants. It was an ordinary administration matter, and notice of motion for the order had been served on all the defendants before the notice of application for the appointment of guardian, but was not returnable till some days after the making this application. *Re Osbaldiston, Osbaldiston v. Crowther*, (1 W. R. 255,) was cited.

VANKOUGHNET, C., granted the order on the authority of the case cited.

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## CHAMBERS v. CHAMBERS.

*Suit in forma pauperis—Master's fees.*

Where a party sues or defends *in forma pauperis* the masters and deputy registrars, being officers of the court, are not entitled to receive any fees from the pauper.

This was an application for an expression of opinion by the judge in chambers, as to whether (the suit being *in forma pauperis*) the master at Kingston was entitled to receive from the pauper any fees for proceedings taken herein. It appeared that the master had taken depositions in the cause, and had declined to transmit them to Toronto on the *præcipe* of the pauper until his fees were paid, and claimed to be paid the usual fees therefor. Chitty's Archbold, 11th ed., p. 1278, was cited.

VANKOUGHNET, C.—The authority cited seems sufficient to shew that in a suit *in forma pauperis* no officer of the court is entitled to any fees from the pauper. You can intimate my opinion to the officer, and no order need be drawn up.

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## WEIR v. MATHESON.

*Supplemental answer.*

The trustees of the university of Kingston had passed a resolution removing W. from his office of professor, who had thereupon filed his bill praying the court to declare him still an incumbent of the office, and entitled to the emoluments thereof, on the ground, among others, that the meeting of the trustees had been irregularly called, and praying an injunction against removing him from his office, which was granted. After the filing of the bill and answer, and pending the motion for the injunction, a new meeting of the trustees had been called, all irregularities having been carefully provided against, which had met after the granting of the injunction, and passed resolutions confirming the prior ones, and again removing the plaintiff from his office. Under these circumstances a motion for leave to file a supplemental answer, setting up the second meeting, and the resolutions passed thereat, was granted upon terms.

McLennan moved, under the circumstances stated in the head note, for leave to file a supplemental answer. The proposed answer was set out in the notice of motion, and an affidavit was filed verifying the resolutions, &c. Stamps v. The Birmingham and Stour Valley Railway Co., (2 Phil. 673, 675,) was cited in support.

*A. Crooks*, Q. C., contra, contended that the matter sought to be put in issue was not sufficient to substantiate a defence in equity, as it appeared from the affidavit filed that a month's notice of any meeting was required to be given to the trustees, but that the notices of the second meeting had not been mailed till the 30th April, and the meeting was held on the 31st May, which would not be sufficient notice for those trustees who resided in distant parts of the province. Counsel further contended that it was not open to the defendants to displace the state of facts existing at the time of the filing of the bill, and which had given rise to the suit, as the plaintiff had come into court attacking the first resolutions, and not the second, also, it might be that the second resolutions were irregular, and that the defendants might pass a third series of resolutions, and ask leave to set these up, and so on, *ad infinitum*. Counsel also urged that it was not competent for a defendant to set up by way of supplemental answer such matter as would compel the plaintiff to file a new bill, or to make an amendment equivalent to filing a new bill, which would be the case here. It was also contended that the motion was made too late, (13th September, 1864,) as the resolutions had been passed on the 31st May, and it might have been made then, and as a replication had been filed, and notice of examination and hearing given for the Kingston sittings, 26th September.

*McLennan*, in reply, said that the arguments advanced by the other side were answered in the case above cited, and also in *Fulton v. Gilmore*, (8 Beav. 156, 1 Phil. 522,) and that it would be very inconvenient for the court to make a decree inconsistent with facts existing at the time it was made. He also contended that the notice of the second meeting was sufficient; a month, meaning a lunar month.

*VANKOUGHNET*, C., after taking time to consider the matter, gave leave to file the supplemental answer as asked upon the terms of paying costs.

## IRVING v. MUNN.

*Delivery of possession after final order.*

Where more than three years had elapsed between the final order for foreclosure and an application for the delivery of possession of the mortgaged premises, the court required an affidavit shewing the circumstances of the possession since the final order, and that the defendant had never relinquished possession.

This was an application on notice made the 14th September, 1864, for an order against the mortgagor to deliver possession of the mortgaged premises. The final order for foreclosure was dated 7th June, 1861.

VANKOUGHNET, C.—As there has been so much delay in making this application, you must produce an affidavit as to the circumstances of the possession since the final order, and that the defendant never relinquished it; if he did at any time he would now be a mere trespasser, and an order would not be granted.

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## TAYLOR v. CUTHBERT.

*Final order for foreclosure—Affidavit of non-payment.*

On an application for a final order for foreclosure where the plaintiff resides out of the jurisdiction, and the affidavit as to non-payment of the mortgage money is made by his solicitor, it must be shewn that the plaintiff has no other agent within the jurisdiction authorised to receive the money.

This was an application for a final order for foreclosure; the plaintiff resided out of the jurisdiction, and the affidavit as to non-payment was made by his solicitor in the suit. It did not shew, however, that the plaintiff had no other agent in the province authorized to receive the mortgage money.

SPRAGGE, V. C.—The affidavit is insufficient; it should show that the plaintiff has no other agent here authorized to receive the mortgage money. You can file a further affidavit shewing this.

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## GRAINGER V. GRAINGER.

*Foreclosure—Bills filed on registered judgments—Stat. 24 Vic., ch. 41—Proceedings in Master's office.*

On proceeding in the master's office, upon a reference as to incumbrances in foreclosure cases, it is not necessary to make search in the office of any deputy-registrar of the court to ascertain whether bills have been filed upon registered judgments, as such bills only preserve the rights of the judgment creditors in the particular suits in which they are filed.

This was a foreclosure suit, and a decree had been obtained with the usual reference to the master to inquire as to incumbrances. The master, when the decree was brought into his office, said that he would require to be satisfied that no bill had been filed on or before the 18th of May, 1861, in any of the outer counties, on a judgment registered against the defendant, which he held to be necessary under the 24 Victoria, ch. 41, which, in his opinion, gave the plaintiff in any such suit a lien upon the lands of the judgment debtor for all purposes.

*Edgar*, for the plaintiff, appealed from this direction, contending that in order to satisfy the requirements of the master it would have been necessary to make a search in the office of every deputy-registrar in the province; and even then it would be impossible to ascertain whether some unknown assignee of a judgment creditor might not have filed a bill.

After conferring with the other members of the court

SPRAGGE, V. C., (before whom the point was argued.) But for the 11th section of the Act 24 Vic., ch. 41, registered judgments would in all cases have ceased to be a lien from the 18th of May, 1861; and the only effect of that section is that the act shall not affect suits then pending in which registered judgment creditors are parties. The master has treated it as if the incumbrances were preserved for all purposes, instead of being confined to the suits in which the

judgment creditors were parties. It is only their rights *in those suits* that are preserved, and it is unnecessary, therefore, to make them parties to other suits.

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NOTE.—It has been considered by several of the practitioners that the effect of this decision was to exclude any such judgment creditor from all claim, both upon the proceeds of the estate and on the estate itself; this view, however, may be questioned, for it is submitted that if there were any such judgment creditor with bill filed on or before the 18th of May, 1861, who, for any reason, was entitled to priority over either the plaintiff or an incumbrancer added in the master's office, although the purchaser of the estate under the decree for sale, would take a good title, such judgment creditor would have a right before the fund was distributed to be paid his claim in priority to those subsequent to himself;—whatever doubt there may be as to his right to call upon any of the subsequent incumbrancers to refund:—and, in the event of foreclosure, that he would be entitled to call upon the party, who had obtained the final order, to pay him his claim, or stand foreclosed.—A. G.

IN RE STEWART.  
STEWART v. STEWART.

*Payment of purchase money into court—Title.*

Where a sale has taken place under a decree of the court, and has been confirmed, an order will be made for the purchaser to pay the balance of his purchase money into court, though no inquiry has been made as to the title.

This was an application on notice by *Evans* for an order against a purchaser of land, sold under the decree in the cause, to pay the balance of his purchase money into court. The purchaser had paid the usual deposit at the time of the sale, and the sale was confirmed, and the time limited by the conditions of sale for the payment of the balance of the purchase money had elapsed. No inquiry as to title had been had, and it did not appear that the title had been accepted or the inquiry waived. Daniel Ch. Pr. 3rd ed. p. 936; Smith Ch. Pr. 7th ed. p. 1015, 1016; *In re Hoskin*, and *Rigney v. Matthews*, before His Honor *V. C. Esten*, not reported, were cited in support of the motion.

SPRAGGE, V. C.—I find upon referring to *In re Hoskin* that a reference was ordered. It appears by the Registrar's book that an order for payment was afterwards made without any order for reference as to title. See Book 12, fol. 489. A subsequent entry in my brother *Esten's* book shews that he ordered payment without a reference as to title.

Order to go.

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NOTE.—In *Rigney v. Matthews* a similar order was made by His Honor *V. C. Esten*. The application in that case was made by *Taylor*, and the authorities cited were *Harding v. Harding*, 4 M. & C. 514; *Saunders v. Gray*, 4 M. & C. 515; *Tanner v. Radford*, 4 M. & C. 519; and *Gray v. Gray*, 1 Beav. 199.

## GILMOUR v. O'BRIEN.

*Payment of purchase money out of court—Reference to take subsequent account dispensed with.*

A report had been made in a suit for the sale of mortgaged property finding that the plaintiff (the mortgagee) was the only incumbrancer on the property, and that the amount due to him was £235 12s. 10d. The property was sold for £261, and the purchase money had been paid into court. Two years after the date of the report, a motion for payment of the whole purchase money out of court to the plaintiff was granted, without a reference to the master to take a subsequent account, it being clear that the interest and the costs of the sale would make the plaintiff's claim larger than the amount of the purchase money paid in.

This was a motion made on the 9th September, 1864, by *Donovan*, for the payment of purchase money out of court to the plaintiff, under the circumstances stated in the head note and judgment. A consent of the solicitor of the purchaser was read.

**SPRAGGE, V. C.**—Upon reference to the papers I find that the amount found due to the plaintiff (the only incumbrancer) by the Master's report of the 8th September, 1862, was £235 12s. 10d. The amount of purchase money is £261, the difference is £25 7s. 2d., against which is two years' interest on the principal money, say £18, leaving for subsequent costs of sale, &c., a much smaller sum than they could possibly amount to. Under these circumstances, seeing that a subsequent computation of interest and taxation of costs would certainly shew the plaintiff entitled to a larger sum than the amount in court, I do not think it necessary to put the plaintiff to the expense of such computation and taxation. I do in effect compute and tax myself, though not formally. The order may go for payment of the purchase money out of court to the plaintiff.

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HEWARD v. RIDOUT.

*Advertisement for sale—Costs.*

An advertisement for the sale of property under decree, should set out all the improvements on the property, otherwise it will be referred back to the master to re-settle the advertisement, and appoint a new day for sale.

*Hamilton* moved on 16th September, 1864, to stay the

sale herein, and to have a reference back to the master to re-settle his advertisement. It appeared that the property to be sold was a block of eight acres within the limits of the city of Toronto, and that the Master had settled the advertisement for the sale in one lot. The advertisement merely described the property as in the mortgage, as Lot No. —, in St. David's Ward, without stating the street. It appeared also that there was a valuable house on a part of the lot which was not mentioned in the advertisement, and it was alleged that it would be much better to sell in lots of a quarter of an acre each.

The application was opposed on the grounds that notice of settling had been served before vacation, that no one attended on behalf of the present applicant, and the advertisement had then been settled; that a warrant to re-settle had been served after vacation, on which occasion also, no one attended on behalf of the applicant, and that it was therefore the fault of the applicant (the mortgagor) if the advertisement did not contain full particulars, as it was contended that the plaintiff (the mortgagee) could not be expected to know these particulars, he not being the person in possession. It was also contended that if the applicant wished a sale in lots, the expenses of survey, sub-division, &c., should be borne by him.

*Hamilton* in reply.

SPRAGGE, V. C.—There should be no puffing in advertisements under a decree of this court; but it is the vendor's duty honestly to set forth all the advantages of the property so as to attract purchasers. The advertisement herein does not convey the information that it might to the general public, and the question of sale in lots or otherwise was not before raised, partly through the neglect of the party now applying. I think it proper to refer it back to the Master to settle a new advertisement and appoint a new day for sale, but it must be upon payment of the costs of the present advertisement and of this application; and the costs of shewing a sale in parcels proper, maps, &c., must be borne by the applicant.

## FAHNER V. RAN.

*Purchase under a decree—Costs of mortgage to secure purchase money.*

Where in an administration suit property was sold upon credit, part of the purchase money to be paid down and the balance secured by mortgage, the sale being under the ordinary condition that the purchaser should prepare the conveyance at his own expense, *Held*, that the purchaser must bear the expense of both deed and mortgage.

This was an application in an administration suit, in the course of which real estate of infants has been sold, partly upon credit, part of the purchase money being paid down, and the balance to be secured by mortgage. The conditions of sale provided that the purchaser should prepare the conveyance at his own expense. It was contended that this condition did not apply to the mortgage, the expense of which should be borne by the estate, as the property was sold on credit for its benefit, and not for that of the purchaser.

*S. H. Blake* contra, urged that the sale on credit was for the benefit of both parties, and cited *In re Fraser* before his honour V. C. *Esten*, not reported.

*SPRAGGE*, V. C., said that it was a general rule that a mortgagor should pay for the preparation of the mortgage deed, and upon that ground, as well as on the authority of the case cited, held that the purchaser should bear the expense of preparing the mortgage.

## ARNOLD V. HURD.

*Fiat on petition.*

The signature by a judge to a fiat on a petition is not an affirmation by him that the case is a proper one for petition.

*Snelling* asked for fiat on petition.

*SPRAGGE*, V. C., while signing the fiat remarked, that it should be understood that when he signed a fiat, it did not amount to an affirmation by him, that the case was a proper one for petition.

## THOMPSON V. HIND.

*Dismissal for want of prosecution.*

*Held per Spragge, V. C., in opposition to Ruttan v. Burnham, *supra*, p. 191, that, on a first motion to dismiss for want of prosecution, it is the settled practice of the court to accept an undertaking to speed, without regard to the delay which has taken place.*

*The plaintiff has a right to examine the defendant at the examination and hearing of the cause, although the plaintiff may have already cross-examined him on his answer, and on an affidavit which he has made in the cause.*

*Hodgins* moved on 20th September, 1864, to dismiss for want of prosecution. It appeared that the plaintiff's solicitor had, in the spring of the year, agreed to go down to the fall examination term. A replication had been filed, but not in time to set the cause down. It appeared that this was the first application of the kind.

*H. Cameron*, contra.—The defendant is out of the province, and the plaintiff wishes to examine him at the examination and hearing, and cannot get on without him. If the defendant will appear at the examination, I will give an undertaking to speed.

*Hodgins*, in reply.—The defendant has already been cross-examined by the plaintiff on his answer, and on an affidavit made by him. The plaintiff cannot get more from him than he has already obtained, besides, he can examine him by commission. He cited *Ruttan v. Burnham, ante*, p. 191.

*SPRAGGE, V. C.*—The plaintiff has a right to examine the defendant at the hearing, though he has examined him before, and cannot be required to do so by commission. Besides, I shall always hold that an undertaking to speed should be received on a first application of this kind. When the orders first came into force, I thought that an undertaking to speed should not be received where no explanation of the delay was given, but the Ex-Chancellor and my brother Esten thought that it should be, on a first application, and accordingly such has been the settled practice of the court for some years past, and I feel bound to follow it, especially as the case of *Ruttan v. Burnham* is now standing for appeal to the full court.

## EVANS V. EVANS.

*Garnishee order—Costs*

A creditor applying for a garnishee order is not entitled to the costs of the application.

*Burns*, for a creditor, applied for a garnishee order. The amount due by the garnishee to the debtor was amply sufficient to pay the amount due the creditor, besides the costs of the application.

*S. H. Blake*, for the garnishee, consented.

*Hodgins*, for the debtor objected to paying the costs of the application. He cited *Bank of Montreal v. Yarrington*, 3 U. C. L. J. 185.

*SPRAGGE*, V. C., after referring to the authority cited, said that the reason given there was, that the garnishee process was a new remedy, and that therefore the party taking advantage of it should not have his costs, and that, though he did not agree with the reason, yet, as it was the rule in a court of co-ordinate jurisdiction, it would be convenient that there should be a similar one in this court, and that he should therefore follow it, until a different one should be established with the concurrence of the other members of the court.

Order granted without costs.

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**BARRY V. BRAZILL.***Administration order.*

The Order (XV.) providing for the administration of estates without bill, applies to simple cases only, and under it the court will not grant an order containing special directions to enquire as to what would be proper to be allowed to the applicant (the widow and administratrix) for improvements made on the property, and for the maintenance of the infant children of the deceased.

This was an application by motion for an order to administer under Order XV. It was asked, that besides the usual directions, the order should refer it to a Master to inquire, what would be a proper sum to be allowed to the applicant,

the widow and administratrix of the deceased, for moneys expended by her in improvements on the property, and for the maintenance of the children of the deceased. Affidavits were read shewing the amount expended in improvements, and for maintenance.

*Kingston, contra*, objected to the special inquiries.

SPRAGGE, V. C.—Upon this application being made, I stated my impression to be, that it would not be proper to direct the special inquiries asked by the plaintiff, upon summary application under the General Order. Upon consideration, I remain of the same opinion. There are no pleadings, and the case is supported by affidavit evidence. The plaintiff may take an administration order with the usual inquiries; if he desire more, he must file his bill.

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#### AIKINS v. BLAIN.

*Guardian ad litem.*

Where a father and his infant children are co-defendants, if it appear that the interest of the father conflicts with that of the children, the court will not appoint the solicitor defending for the father, *guardian ad litem* to the infants.

This was an application by the plaintiff for the usual order to appoint a guardian *ad litem* to infant defendants.

*Hodgins*, the solicitor for the father of the infants, who was a co-defendant, appeared with a retainer from the father, asking him to act as guardian. The facts appear in the judgment.

SPRAGGE, V. C.—I find, upon reading the bill, that it is filed by two out of three executors, against a third as a defaulting executor, the third is the father of the infants. The infants are beneficially interested under the will. The interests of the father and of the infants are therefore conflicting, and it will not be proper to appoint as guardian to the infants the solicitor who defends for the father. I do not know whether the regular notice has been given.

## McPHERSON v. McCABE.

*Next friend to married woman.*

Where a married woman files a bill without a next friend, the proper order to make, in the first instance, is that a next friend be appointed, and that all proceedings in the suit be stayed in the meantime.

The bill herein had been filed by a person who was described therein as a spinster, but it appeared from an affidavit of her brother that she was a married woman, and was so when the bill was filed, and *Osler* now applied for an order to dismiss the bill, or that a next friend should be appointed, and proceedings stayed in the meantime. He cited *Grant v. Mills*, 29 L. T. 11.

*Hoskin*, contra.

**SPRAGGE, V. C.**—Ordered the proceedings to be stayed till the appointment of a next friend, and said that if this were not done within a reasonable time an application could be made to limit a time therefor, or in default that the bill be dismissed. The order to be without costs, the plaintiff being a married woman.

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## GOULD v. BURRITT.

*Appeal from Master's decision.*

Where a Master had refused to allow evidence by affidavit, which it was contended he should have allowed, *held*, that this was such an exercise of his discretion as would require an appeal against it to be made to the court, and not to a judge in Chambers.

It appeared that the applicants, who were accounting parties as executors, had filed the usual accounts verified by affidavit, but it was alleged that the accounts were not correct, and the executors had required the Master to admit further affidavits from them, explaining their former one, which would have the effect of considerably lessening their liability. This the Master had refused to do, and this application was now made for an order that the affidavits should be received.

*S. H. Blake*, contra, objected that the application should

be to the court, and cited *Ledyard v. McLean*, and *Fitzgerald v. The U. C. Building Society*. *ante* p. 183.

SPRAGGE, V. C.—This is in the nature of an appeal from the Master's decision, and should therefore be to the court, that being now the settled practice. When I say that all applications in the nature of an appeal from a Master's decision should be to the court, I do not mean as to the taxation of costs, that of course comes on in Chambers.

Adjourned into court.

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#### PIPE v. SHAFER.

*Final order for foreclosure—Occupation rent.*

Where the plaintiff (a mortgagee) is in occupation of the mortgaged premises, the Master should charge him with occupation rent up to the day appointed for payment, so, where it appeared that a mortgagee under such circumstances had been charged with occupation rent, only to the date of the Master's report, and had since continued in possession, the final order was refused.

This was an application for a final order for foreclosure. It appeared that the plaintiff had been, before the date of the report, (February, 1864,) and had since continued in the occupation of the mortgaged premises, but that the master had only charged him with occupation rent up to the date of the report. The day appointed for payment was in August, 1864.

SPRAGGE, V. C.—The plaintiff has been in occupation from February till August, and has not accounted for any occupation rent for that time. You must take a subsequent account, and appoint a new day for payment, one month from the date of the order, according to the practice. The registrar can take the account, and he had better charge the plaintiff with rent up to the end of the month.

## ARMOUR v. ROBERTSON.

*Proof of identity of party served with bill.*

It is not sufficient proof of the identity of a party served out of the jurisdiction that the deponent to the affidavit of service swears that he served "the above-named defendant." The affidavit should shew the means of knowledge.

This was an application by *E. Boyd* for an order *pro confesso*, against a party served with the bill out of the jurisdiction. The only proof of identity offered was that the deponent to the affidavit of service swore that he had served "the above-named defendant."

SPRAGGE, V. C.—The affidavit is of course insufficient, as it does not state how the deponent knows the party served to be the defendant.

Order refused.

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## ARNOLD v. HURD.

*Partition suit—Vesting order.*

In a suit for partition, the greater part of the property, the subject of the partition, had been sold under the decree of the court, but portions of it still remained unrealized. It appearing that all prior charges upon the property (such as the costs of the various parties to the suit, &c.) had been paid, and that the unrealized property was far less in value than the amount for which one of the co-owners (the plaintiff) was entitled to credit, in account with the other co-owners, on a petition by the plaintiff, an order was granted, vesting all the unrealized property in him.

This was a partition suit, the property the subject of the partition consisting of lands and mortgages. On taking the accounts between the co-owners of the property, a balance of about £3,689 had been found in favor of the plaintiff, one of the co-owners. A receiver had been appointed in the cause, to get in the mortgages. The greater part of the property had been sold in the cause, and the plaintiff had, at the sale, purchased to the extent of about £1,096. The purchase money of the other property sold, and the amount collected by the receiver, (less his costs and commission,) had been paid into court, and had more than covered the costs

of the several parties to the suit, and other charges prior to the plaintiff's claim, and these costs and charges had been paid thereout, and the plaintiff's was the first charge upon the property. The court had dispensed with payment of the plaintiff's purchase money into court, and after being charged with that, and with the balance which had been paid out of court to him, his claim would still amount to over £2,000. It appeared that portions of the property, consisting of four mortgages and two lots of land had not been sold under the decree, and were unrealized, but that their value did not amount to more than £500, and *Snelling* now presented a petition, which had been served on all parties interested, on behalf of the plaintiff, praying that the unrealized property might be vested in him. Counsel was about to cite authorities in support of the application, but

SPRAGGE, V. C., said he thought sufficient ground was shewn, and granted the application in terms of the prayer of the petition.

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#### BROWN v. PERRY.

*Vacating receiver's recognizance—Notice of application therefor.*

A receiver being appointed for the benefit of all parties to a cause, he should, on moving to vacate his recognizance, give notice to all parties.

This was an application on behalf of the receiver in the cause for an order to vacate his recognizance. It appeared that the receiver had passed his accounts, and that the property of which he had been appointed receiver had been sold in another suit. Notice of this application had been served upon the plaintiff, a judgment creditor, who appeared and consented, but the defendant, the judgment debtor, had not been notified.

SPRAGGE, V. C.—A receiver being appointed by the court is an officer of the court, and acts for the benefit of all parties, being in the position of a *quasi* trustee to all, and it is a general rule that you cannot discharge a trustee in the

absence of any of his *cestuis que trustent*. You must, therefore, give notice to the judgment debtor.

Order refused.

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### BUNN v. BARCLAY.

*Service of bill on married woman.*

It is not necessary to serve the bill on a married woman (her husband being a co-defendant) before obtaining an order to answer separately, service on the husband alone is sufficient.

This was an application for an order against a married woman to answer separately. It appeared that the bill had been served on both husband and wife, they being co-defendants, and,

SPRAGGE, V. C., in granting the order, remarked, that it was not necessary to serve the bill on a married woman, before obtaining an order against her to answer separately, service on the husband being sufficient.

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### SAWDON v. HEASTY.

*Final order for sale—Place for payment of money ordered.*

The order of 29th June, 1861, directing money ordered to be paid, to be paid into some bank, does not apply to a suit by a vendor to enforce his lien for purchase money.

In a suit of this nature in applying for the final order for sale, it is not necessary that the affidavit of the plaintiff as to non-payment should negative the fact of possession or the receipt of rents and profits.

This was an application for a final order for sale. The suit was by a vendor to enforce his lien for purchase money, and the vendee had been ordered to pay the amount found due to the plaintiff, to him, at the office of his solicitors. The affidavit of the plaintiff as to non-payment did not negative possession, or the receipt of rents and profits.

SPRAGGE, V. C., held that the master had rightly appointed the money to be paid at the office of the plaintiff's

solicitors, as the order of the 29th June, 1861, only applies to mortgage money; and that it was unnecessary in a suit of this nature, on applying for a final order for sale, that the plaintiff should negative possession of the property, or the receipt of rents and profits.

Order granted.

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#### CAMPBELL v. GARRETT.

*Final order for foreclosure.*

On an application for a final order for foreclosure, the bank certificate of non-payment should be made by the cashier, or other like officer. A certificate of the accountant, as such, is not sufficient.

This was an application by *Crickmore* for a final order for foreclosure. The usual bank certificate as to non-payment was signed by the accountant. It was alleged that the manager of the bank was absent, and that the accountant was acting as manager *pro tem.*, but these facts were not shewn.

**SPRAGGE, V. C.**—The certificate should be signed by the cashier or manager, or other the like officer, that is, the person in charge of the office; the accountant is not a like officer to the manager or cashier; the certificate is, therefore, insufficient. I must put you to renew the application, as I have of late, with the concurrence of the other members of the court, established this practice, as the time of the court has been much wasted by solicitors making applications on imperfect papers.

Order refused.

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#### BLAIN v. TERRYBERRY.

*Application to commit a witness for refusing to sign depositions.*

An application to commit a witness for contempt in refusing to sign depositions made by him, will not be granted *ex parte*; notice should be served on the witness.

This was an *ex parte* application by *Spencer*, for an order to commit a witness for refusing to sign depositions made by

him in a cause before one of the masters. *Copeland v. Stanton*, 1 P. W. 414; *Courtenay v. Hoskins*, 2 Russ. 253; *Nolan v. Shannon*, 1 Mol. 157, were cited to shew that the depositions were imperfect until signed by the witness.

**SPRAGGE, V. C.**—Only two of the cases cited appear to apply to the point as to signature of the depositions, and even if the rule be as contended for, it may be doubted if it applies in strictness where the person taking the depositions (*i.e.*, the master) is the same as the one who uses them. However, as it may be that the witness properly refused to sign them, you must give him notice of this application.

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#### TRUEMAN V. SCHOOL TRUSTEES FOR PEEL.

*Consent of party—How verified.*

Where on an application for an order, a consent of a party to the cause is produced as a ground for making the order, it must be shewn that the effect of signing such consent was explained to the party, and was understood by him.

*Hodgins* moved on behalf of the plaintiff for an order to dismiss his bill of complaint without costs. A consent of the defendants was produced, signed by the proper officer, and sealed with the corporate seal, to which was annexed an affidavit verifying the execution. The affidavit, however, did not state that the effect of signing the consent was explained to the party signing.

**SPRAGGE, V. C.**—The affidavit of execution is insufficient. It does not show that the effect of signing the consent was explained to the party signing, and was understood by him.

Order refused.

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## EARLY v. MCGILL.

*Examination of witness de bene esse.*

An application to examine a witness *de bene esse*, on the ground that he is about to leave the jurisdiction, will not be granted *ex parte*, notice must be served.

This was an *ex parte* application by *J. C. Hamilton*, for an order to examine a witness *de bene esse*, on the ground that he was about to leave Canada.

**SPRAGGE, V. C.**, declined to grant such an order *ex parte*, but gave leave to serve one clear day's notice of motion.

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## ROBINSON v. DOBSON.

*Service of bill on infant—Application to appoint guardian.*

An infant should be served with the bill before the return of the notice of application for the appointment of guardian, otherwise notice of the application will have to be re-served.

A notice of application for the appointment of a guardian to an infant defendant had been served, and *Foster*, on the return of the notice of application, appeared for the plaintiff, and stated that the bill had not been served on the infant, and asked that the notice might be enlarged for a week, so as to effect service of the bill in the meantime. No one appeared for the infant.

**SPRAGGE, V. C.**, declined to allow the motion to stand as asked, and directed that a new notice of the application should be served as well as the bill.

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## ELLIS v. ELLIS.

*Foreclosure suit—Vesting order.*

A mortgagor, who has in the course of a foreclosure suit duly redeemed the property, is not obliged to accept a simple discharge of the mortgage, but may, at his option, have a vesting order of the property.

This was an application for a vesting order by *J. A. Boyd* on behalf of the defendant, a mortgagor, he having

duly paid the mortgage money. It was objected on the other side that a simple discharge of the mortgage was sufficient for all purposes.

SPRAGGE, V. C.—It is admitted that the mortgage money is paid off; the applicant may, therefore, take the order as asked, he is not obliged to be content with an ordinary discharge of mortgage.

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### KNOTTINGER v. BARBER.

#### *Final order for foreclosure*

Where the account is changed in a foreclosure suit after the master's report, and a notice of credit is given under the Order of 29th June, 1861, such notice should be given before the day appointed for the payment.

This was an application for a final order for foreclosure. It appeared that the defendant, the mortgagor, had paid a portion of the amount found due, since the master had made his report, and that the plaintiff had served him with notice of credit under the Order of 29th June, 1861, but not until after the day appointed for payment.

SPRAGGE, V. C., held that the notice was of no avail, as it should have been served before the day appointed for payment, and directed a new account to be taken, and a new day appointed for payment.

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### BOYD v. WILSON.

#### *Foreclosure suit—Endorsement on bill of amount claimed.*

On taking the account in foreclosure suits no more can be found due than the amount claimed by the endorsement on the copy of the bill served.

This was a foreclosure suit, and the bill when served had been endorsed under the Orders of 10th January, 1863, but the amount claimed thereby was only the amount due at the time of bill filed, some instalments not having then

fallen due. The master, in taking the account, had refused to go beyond the amount claimed in the endorsement, and now *Burns* moved *ex parte* (the decree having been taken on *præcipe*) for an order, directing the master to take an account of the whole amount subsisting and unpaid on the mortgage.

SPRAGGE, V. C.—I do not think I can help you under the circumstances; you should have claimed the whole amount.

Order refused.

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#### MACFIE v. McDougall.

*Foreclosure suit—Married woman—Decree on præcipe.*

The fact that a married woman is a defendant to a foreclosure suit (the time for her separate answer having elapsed) does not render it necessary to apply to a judge in Chambers, for a direction to the registrar to draw up the decree on *præcipe*, as the registrar has power to do so without any direction.

This was an application in a foreclosure suit for a direction to the registrar to draw up the decree on *præcipe*, as it was thought, that the fact of there being a married woman defendant, rendered such a course necessary. An order against her to answer separately had been obtained and served, and the time for her answer had elapsed.

VANKOUGHNET, C.—You need not come here for any direction. The case of a married woman is different from that of an infant, and it seems to be held in England that a married woman defendant, after an order to answer separately is to be treated as a *feme sole*. The registrar will draw up the decree without any direction.

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## JOHNS V. FURZE.

*Enlarging time to make award.*

On applying for an order to enlarge the time for making an award, the original agreement to arbitrate should be produced, or if in the custody of the opposite party, it must be shewn that he refuses to give it up; it is not sufficient that the party applying swears merely that he cannot procure it.

This was an application by *S. H. Blake* for an order to enlarge the time for making an award. In support, Con. Stats. U. C., ch. 22, sec, 172, and Russell on Arbitration, p. 550 were cited. The original agreement to arbitrate had been made an order of court, but was not produced, the party applying swearing that it was in the custody of the opposite party and that he could not procure it. A verified copy of the agreement was sought to be put in.

**VANKOUGHNET, C.**—The original agreement should be produced, if possible; the affidavit does not state that the party refuses to give it up, and it is only where the opposite party so refuses, or it is not possible, from other causes, to produce the original, that the court will receive a copy.

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## ADAMS V. EAMER.

*Foreclosure suit—Dispensing with service of order appointing a new day.*

On an application, in a foreclosure suit, for an order appointing a new day for payment of the mortgage money, it was asked that service of the order should be dispensed with, the defendant being out of the jurisdiction; but the only evidence of that fact being an affidavit of the plaintiff, the court declined to treat such affidavit as evidence of the fact, and directed the order to be served if possible.

This was an application by *Snelling* for an order appointing a new day for payment of mortgage money, the suit being for foreclosure. It was also asked that service of the order might be dispensed with, and an affidavit of the plaintiff was read showing that the defendant had left the province, and had no residence here, and had told the plaintiff that he had no intention of returning.

**VANKOUGHNET, C.**—The statements in the affidavit, if

true, are no doubt a sufficient ground for dispensing with service of the order, but the affidavit of the plaintiff merely, is not sufficient evidence. In order to save time, however, you can take an order in the alternative, to serve him if he can be found within the jurisdiction, if not, that service be dispensed with, which will necessitate, when you come for the final order, the production of an affidavit from some other person than the plaintiff, as to the defendant being out of the jurisdiction.

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#### THE BANK OF MONTREAL v. WALLACE.

*Administration ad litem.*

The court will not appoint an administrator *ad litem* of a deceased party, where the party deceased had a substantial interest in the suit.

This was an application by *G. M. Evans*, on petition of the plaintiffs which had been served on all parties, for the appointment of an administrator *ad litem* to a deceased party to the suit. It was a mortgage case, and a final order for sale had been granted and the sale advertised; but after the final order had been obtained and before the sale, the defendant (the mortgagor) had died, and it was now asked that an administrator *ad litem* might be appointed, it being contended that the final order for sale operated as a foreclosure against the mortgagor.

**VANKOUGHNET, C.**—The court will only appoint an administrator *ad litem* to a party who has no substantial interest, such as a naked trustee. The deceased here is the person directly interested in the estate to be sold, being in fact the owner of it, and entitled to any surplus out of the proceeds of the sale. I think you must revive the suit against the heirs of the mortgagor, I do not see how you can get along without it, it is one of those accidents which cannot be helped.

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NOTE.—A similar decision was given by his Lordship on the same day in the case of *Wallace v. McKay*.

## BRANDON V. WHEELER.

*Order for married woman to answer separately.*

The court will not, at the instance of the plaintiff to the suit, grant an order for a married woman to answer separately, unless the husband has been served with the bill. The fact that the husband has absconded and cannot be found, does not alter this rule.

This was an application by *Donovan*, on behalf of the plaintiff, for an order for a married woman defendant, to answer separately, her husband being a co-defendant; the bill had been served upon her, and more than four weeks had since elapsed. It appeared, however, that the husband had not been served with the bill, the plaintiff being unable to find him, and that it would probably be necessary to serve him by publication.

**VANKOUGHNET, C.**—I cannot grant the order; you must serve the husband first, and the time for the joint answer must have elapsed; that is, the settled practice of the court; it makes no difference that the husband cannot be found. The Orders of Court provide for such cases by advertising the defendant, and if after the expiration of the time limited for the husband to answer, the wife shall have omitted to put in her answer, an order, such as is now asked, may be obtained.

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## HARRIS V. MEYERS.

*Attornment—Order nisi.*

The court will not grant an order *nisi* against a person not a party to the suit, where an order against such a person is required, the proper practice to obtain it, is by notice of motion or petition.

This was an application for an order *nisi* to compel a tenant of a party to the suit to shew cause why he should not attorn to the receiver in the cause.

**VANKOUGHNET, C.**—You cannot get an order *nisi* against a stranger; that process is only applicable to parties to a suit; you must serve a petition or notice of motion.

## MARTIN v. PURDY.

*Re-sale of property in mortgage suit.*

Where a sale has proved abortive by reason of the purchaser refusing to complete the contract, a re-sale will be granted *ex parte*, but if any relief is asked against such defaulting purchaser, notice must be served on him.

This was an *ex parte* application for a re-sale. It appeared that a person had attended at the sale and bid for the property, and that it had been knocked down to him, when he said he had not sufficient money with him to pay the usual deposit, but that he would get it and return and pay it in a few hours, which he had failed to do, and upon being afterwards requested to complete his purchase, had refused.

VANKOUGHNET, C.—You can have a re-sale simply without giving notice, but if you wish any relief against the purchaser, such as to make him liable for the costs of the sale, or for any deficiency on a re-sale, you must serve him with notice.

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## IN RE ECCLES AND CARROLL, SOLICITORS, &amp;c.

*Taxation of a solicitor's bill of costs.*

Where a solicitor has neglected to take a written retainer from his client, and there is afterwards a dispute between them as to the retainer, and the evidence is conflicting, this court will give weight to the denial of the client as against the solicitor.

This was an application by *Carroll* for leave to deliver an amended bill of costs. The plaintiff in the suit (foreclosure) was one Ann Brown, but it was sworn to on behalf of the solicitors, that one R. F. Brown, a son of the plaintiff, had brought the mortgage to the solicitors, and had stated that he was the real owner of it, he having used the name of his mother as a protection against creditors, or because he was in the sheriff's office; that he had given instructions as to the suit throughout; that the plaintiff Ann Brown had never been to the solicitor's office; that she was worth nothing, and that the costs would be lost, if the solicitors were compelled to look to her only for them.

*Hodgins*, contra, read affidavits from the plaintiff and R. F. Brown, to the effect that the mortgage belonged solely to Ann Brown, and that R. F. Brown had no interest in it; that no such statement had been made by R. F. Brown as sworn to on the other side, and that he had not retained the solicitors personally, but instructed them, merely as the agent of the plaintiff.

*Carroll*, in reply.

**VANKOUGHNET, C.**—It is the practice of this court that where a retainer is asserted by a solicitor and denied by the alleged client, to give weight to the denial of the client as against the solicitor. It is very careless of solicitors not to take a written retainer from clients, as they render themselves liable at any moment to have their claim for costs disputed, especially where the party sought to be charged is not the party to the suit; if solicitors are so incautious as not to take a written retainer, they must submit to the loss.

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#### BALDWIN V. CRAWFORD.

*Death of surety of receiver—Approval of new one.*

Where a surety of a receiver dies pending the suit, the receiver may obtain *ex parte* an order referring it to the master to approve of a new one.

This was an *ex parte* application on behalf of the receiver in the cause for an order referring it to the master to approve of a new surety, a former one having died.

**VANKOUGHNET, C.**, granted the order as asked.

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#### HENRY V. MCKEOWN.

*Ex parte applications.*

On an *ex parte* application the court will not listen to any objections from the other parties to the suit.

This was an *ex parte* application for an order *nisi* to compel the delivery of an abstract of title pursuant to a

master's direction. The party required to produce the abstract appeared by his solicitor, and objected to the order being granted, alleging that an understanding had been made not to move for the order.

VANKOUGHNET, C.—This is properly an *ex parte* application, and I cannot therefore listen to anything from the other side. If the order is taken out contrary to any understanding, of course it can be set aside.

Order granted.

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### SIMPSON v. SIMPSON.

*Redemption suit—Parties to conveyance—Dower.*

A foreclosure suit had been brought and a final order obtained therein: some time afterwards the mortgagor had filed a bill to redeem, and the court had opened the foreclosure and granted redemption; it appearing that no change had taken place in the relative position of the parties, *held*, on a motion by the mortgagee for payment out of court of the mortgage money, that it was unnecessary for the wife of the mortgagee to join in the conveyance to the mortgagor to bar dower.

This was a redemption suit, the premises in question had been previously foreclosed and a final order granted under which the defendant in the present suit had held possession for some time. The foreclosure had been opened and redemption granted and the plaintiff had paid the mortgage money into court, and now *D. McLennan* moved for payment out to the defendant, he having duly executed the conveyance to the plaintiff.

*Spencer contra*, objected on the ground that the wife of the mortgagee had not released her dower, not being a party to the conveyance.

ESTEN, V. C., held that, as a final order for foreclosure was a defeasible instrument, and as, in this case, there had been no change in the relative position of the parties, it was unnecessary for the mortgagee's wife to be a party to the conveyance in order to release her dower.

## WATSON V. MOORE.

*Clerical error in Master's report.*

An Order to correct a clerical error in a Master's report will be granted *ex parte*.

The Master before whom the accounts had been taken, after finding that the amount due to the plaintiff was \$476.62, stated the same as equal to £109 3s. 1d., instead of £119 3s. 1d., and directed payment by the defendant of the smaller sum, and *Taylor* moved *ex parte* for an order to correct the report, citing *White v. Courtney*, Chambers R. 11.

VANKOUGHNET, C.—You may take an order correcting the error.

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NOTE.—A similar order to correct a clerical error in a Master's report was granted *ex parte* by his Lordship on 27th October, 1864, in *Heward v. Elliott*.

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## THOMPSON V. WALKER.

*Leave to appeal from master's report after confirmation*

On an application for leave to appeal from a master's report after confirmation, it must be shewn that the master is wrong, or, at least, that there is some reasonable ground for doubting the correctness of his decision.

This was an application by *S. H. Blake*, 24th October, 1864, for leave to appeal from the master's report, which had been confirmed on the 14th September, 1864. An affidavit of the applicant was read shewing that the master had not taken any account of the amount due by the defendant to the plaintiff at the time of filing the bill, and that if it had been so taken it would have appeared that nothing was then due. The hearing on further directions had taken place, and the costs of the suit awarded to the plaintiff, but the decree had not been entered, and it was contended that if it had appeared on the report that nothing was due at the date of filing the bill, the court might have given a different decision with regard to the costs. Notice of appeal had not been served in due time through the neglect of the solicitor of the

applicant, and it was contended that the client should not suffer by reason of it. *Thompson v Rook*, before his honor V. C. *Esten*, (not reported,) was cited. In that case leave had been granted more than eighteen months after the confirmation of the report.

*G. Murray*, contra, for the plaintiff, read an affidavit shewing that great delay had taken place in the Master's office, which had been caused by the applicant, and that he ought to have no indulgence shewn him. He contended that the amount due at the time of filing the bill was not material, as that was not in question in the suit, the object of which was to ascertain what was the state of account existing between the parties, with a view to inserting the amount in a mortgage security which was to be given by the defendant. He cited *Turner v. Turner*, (1 Swan 154;) *Hawkins v. Day*, (1 Ves. 189.) Counsel also asked for leave to give notice of cross appeal in case the application were granted.

*S. H. Blake* in reply.

*VANKOUGHNET, C.*—I apprehend that where, after confirmation of a report, leave is asked to appeal, some reasonable ground must be shewn for doubting the decision of the Master at least, if not that he is wrong; and as I think that it may reasonably be doubted whether the Master was correct in refusing to go into the state of accounts at the time of filing the bill, which I think may have influenced the court in regard to the costs of the suit, I will grant the application; but it must be on the terms of paying the costs of this application, and of the proceedings taken since the confirmation of the report, and notice of the appeal must be served within one week after the taxation of the costs. The plaintiff may give notice of cross appeal. His Lordship commented upon the negligence of solicitors, by which applications of this and a similar nature were necessitated, and said that, if an improvement were not shewn in this respect, the court would be obliged to order solicitors, personally, to pay the costs incidental to such applications.

## BOWEN v. TURNER.

*Leave to amend.*

Where the time has elapsed for obtaining the usual order of course to amend, the court will not grant an order to amend *as the plaintiff may be advised* as an indulgence, on the ground that the plaintiff had intended to take out the usual order within the proper time, but had not done so through a mistake of a clerk of his solicitor.

This was an application on notice for an order to amend as the plaintiff might be advised. An affidavit of a clerk of the plaintiff's solicitor was read, shewing that it was the intention of the solicitor to amend the bill, but that the usual order had not been taken out in due time by mistake.

*Hodgins*, contra, objected that such an order was never granted on an application of this kind; the amendments should be put in, and the truth of them should be shewn to the court.

On the other side, in reply, it was contended that the motion was not made in accordance with the strict practice, as laid down in Order IX., sec. 14, but that the order was asked as an indulgence, and terms would willingly be submitted to.

VANKOUGHNET, C.—It is not in my power to grant the indulgence, as I think the Order IX., sec. 14, is peremptory in its requirements.

Order refused.

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MERRILL V. ELLIS.

*Leave to answer after order pro confesso.*

On a motion for leave to answer notwithstanding an order *pro confesso*, the answer sought to be put on the files, should be produced to the court duly sworn.

This was an application by *Hodgins* on behalf of the defendant for leave to file an answer notwithstanding that the bill had been taken *pro confesso*. After going into the merits of the application, the proposed answer was put in.

*S. H. Blake* contra, objected that the *jurat* to the answer was insufficient. The defendant was a marksman, and the objection was that there was no witness to his signature, it being contended that in such case there should be a witness who should be sworn as well as the defendant. Smith's Ch. Pr., 7th ed., p. 478, and the form of *jurat* given by the general orders of 1853, schedule F. were referred to.

*Hodgins*, in reply, did not answer the objection as to the form of the *jurat*, and

VANKOUGHNET, C., said, that if the answer had been properly sworn to, he would have granted the application, but that, as it was a general rule that on applications of this nature the proposed answer should be put in, duly sworn to, he must refuse the application with costs.

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NOTE.—On the following day the case was spoken to on behalf of the applicant as to the sufficiency of the *jurat*, and it then appeared that, the answer having been read over by the commissioner, the form of *jurat* given at p. 335, of Snelling and Jones' Orders, was used. It was now contended that this *jurat* was sufficient on the ground that where the answer was read by the commissioner and the mark made in his presence, it was unnecessary to have the mark attested. Daniel's Ch. Pr., 3rd ed., p. 600; Pilkington v. Himsorth, 1 Y & C Exch. 615, note a; Braithwaite's Record and Writ Practice, pp. 380 and 388 and notes, were cited in support of this view of the matter. His Lordship then remarked that the form given in the schedule to the Orders of June, 1853, seemed only to contemplate the case of the answer not being read by the commissioner, but that it seemed reasonable to suppose, that, where the answer was read by the commissioner, and the defendant made the mark in his presence, it was not necessary to attest the mark, but that as Mr. Hodgins had not replied to the objection when taken by Mr. Blake, and as the application had been disposed of, he could make no other order on the motion.

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### MACBETH V. SMART.

*Filing papers—Payment of fees.*

An appeal bond and the affidavit of execution thereof are separate documents, and must be stamped as such when filed. The recent act respecting law stamps has made no alteration in the practice of the court as to the mode of computing the proper amount of fees.

It appeared that the usual appeal bond, upon the back of which, and on the same sheet of paper, the usual affidavit of execution was written, had been filed, the bond being stamped with the proper ten cent stamp, but by an over-

sight no stamp had been affixed to the affidavit of execution, and now *Smart* asked for an expression of opinion, as to whether the bond and affidavit were to be counted as one or two filings, and if as two, then that leave might be granted to affix the proper stamp on the affidavit. It appeared that the officers of the court had hitherto required, and solicitors had granted, payment for such a proceeding as two filings, but it was argued that such could not be considered as the settled practice of the court, as solicitors had complied with the demand more to avoid dispute than because they considered the charge a proper one, but that the recent act would necessitate the profession in future to be more careful in the payment of fees to avoid any penalty, and it was contended that the bond being incomplete and of no use without the affidavit of execution, that the two should be counted as one document, and filed as such. As to the power of the court to grant leave to stamp a document where it had been omitted by mistake, sec. 18, of the act, (27 & 28 Vic., ch. 5,) was cited.

**VANKOUGHNET, C.**—I think the bond and affidavit should be counted as two documents; the bond is complete in itself as a bond without the affidavit, although it would be of no use: besides, the act has not altered the practice of the court as to the mode of computing the amount of fees to be paid on proceedings taken in it, and as in such case two filings have always hitherto been paid for, I think the practice must be considered so settled. You can take the order giving leave to affix the proper stamp on the affidavit.

Order granted without any penalty.

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SPAWN v. NELLES.

*Dismissal for want of prosecution.*

The fact that a replication has been filed, and that the defendant himself is therefore in a position to set the cause down for examination and hearing, is no bar to a motion to dismiss for want of prosecution.

This was a motion made on the 2nd of November, 1864,

on behalf of the defendant, to dismiss the plaintiff's bill for want of prosecution. The answer had been filed on the 21st of March, 1863, the replication on the 7th September, 1863, and the plaintiff had set the cause down for examination and hearing for the Hamilton sittings in October, 1863, but he had procured it to stand over, and nothing had been done by him since, notwithstanding that the defendant had served a notice on him, requiring him to proceed with the suit, and threatening to move to dismiss the bill.

It was objected, that after replication filed it was not competent for a defendant to move to dismiss for want of prosecution, as he was in a position to prosecute the suit himself, by setting the cause down. *Richardson v. Moser*, *ante* p. 18, was cited.

In reply *Lewis v. Jones* and *Evans v. Evans*, in this court, (not reported) were cited.

**VANKOUGHNET, C.**, after taking time to look into the authorities cited:—It seems that bills in cases in the stage in which this suit is, have been dismissed on notice. It is a convenient practice and saves expense, and I therefore follow it.

Order to go.

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NOTE.—This case seems to overrule *Richardson v. Moser*, *ante* p. 18.

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### DALY v. ROBINSON.

*Subpæna to examine a plaintiff residing in Lower Canada.*

Where a defendant asks for an order for a subpoena to examine a plaintiff resident in Lower Canada, it is unnecessary for him to shew, that there is no cause of action for the same matter pending in Lower Canada.

This was an *ex parte* application on behalf of the defendant for an order for a subpoena to issue against one Scott, a plaintiff in the suit, who was, as appeared by the bill, a resident in Lower Canada. No affidavit was filed.

**VANKOUGHNET, C.**—It is usually necessary, on applica-

tions of this kind, to shew that no action is pending in Lower Canada respecting the same matter, but I do not think it is necessary where, as in this case, the application is made by a defendant against a plaintiff, the latter having set the cause in motion here.

Order granted.

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### GROVES V. RYVES.

*Dismissal for want of prosecution.*

An order to dismiss a bill for want of prosecution will not be granted after decree made in the cause.

This was an application by *H. Murray* to dismiss for want of prosecution. It appeared that the case had been set down to be heard, and the applicant was under the impression that the plaintiff had neglected to take out the decree, but it was shewn on the other side that the decree had been duly taken out some time since, though nothing had been done under it.

**VANKOUGHNET, C.**—I cannot grant the present application. I suppose any party can move to have the carriage of the decree and take it into the Master's office.

Application refused with costs.

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### THE MUNICIPALITY OF ORFORD V. BAYLEY.

*Application to make a person interested in the equity of redemption a party in the Master's office.*

A foreclosure suit had been instituted and concluded, the final order having been obtained. Afterwards it was discovered that prior to the filing of the bill the mortgagor had sold a portion of the equity of redemption; under these circumstances, an application for a *fiat* on a petition, praying that the purchaser might be made a party in the Master's office, was granted, the court however expressing an opinion, that the prayer of the petition could not be granted.

This was a foreclosure suit which had been instituted by a solicitor who was now dead, and in which a final order had been obtained. Subsequently it was discovered that, previous

to the filing of the bill, a portion of the equity of redemption had been sold by the mortgagor, and the final order was therefore incomplete, and an application was now made for a *fiat* on a petition praying that the purchaser might be made a party in the Master's office, as being interested in the equity of redemption. The order of 29th June, 1861, and *Duncan v. Shortis*, before his Lordship *Vankoughnet*, C. (not reported) were cited.

**VANKOUGHNET, C.**—The matter is out of the Master's office and the suit closed. I do not think the order of the 29th June, 1861, contemplates such a case as this, as the Master has no longer any jurisdiction in the suit. I will grant you the *fiat* if you insist upon it, but if the party appears and objects, I do not think I shall grant the order asked. I think you had better file a bill. In *Duncan v. Shortis* I believe there was a consent by the purchaser, otherwise I should not have granted the order. I know it has been the practice to grant orders of this kind where one part owner of the equity of redemption has not been made a party to the bill, and where the suit is still in the Master's office, but I think even that is beyond the scope of the Order, the words of which are, "by reason of the parties so interested being numerous or otherwise." This seems to contemplate the case of a lot being split up into several parts and sold, as is frequently the case in this country.

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#### IN RE FALCONER.

*Motion for administration order.*

The facts, that an estate is small, that no imputation is made against the executors of it, and that it is unadvisable to incur legal expenses, are no answer to a motion by a legatee against the executors, for the usual administration order.

*Osler* moved for the usual administration order under Order XV., on behalf of a legatee against the executors.

*J. A. Boyd* for the executors. The estate is small and for the most part has been administered; no imputation has

been cast upon the executors, the fact being, that they have paid a considerable sum out of pocket beyond the amount received by them from the estate ; it is unadvisable to saddle the estate with legal expenses. It is discretionary with the court whether to grant the order or not, the words of the Order are, "if the court shall think fit."

VANKOUGHNET, C.—I could not prevent this legatee from filing a bill ; and it is a general rule that any person interested in an estate may demand the intervention of the court to administer it, no matter how correct the executors may have been. As to the words "if the court shall think fit," they merely mean that the court must satisfy itself that the case is a proper one for summary administration under the Order, and not one where a bill should properly be filed.

Order granted.

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#### KING v. CONNOR.

*Change of place for payment of mortgage money.*

Where mortgage money was ordered to be paid into an agency of the Bank of Upper Canada, and afterwards, and before the day appointed for payment, the agency was closed, on a motion to substitute another bank at the same place, held, that a new day for payment must be fixed, and the order served.

This was a foreclosure suit, in which the mortgage money had been ordered to be paid into the Bank of Upper Canada, Lindsay. It appeared that the bank had subsequently closed their agency at Lindsay, and an application was now made for an order substituting the Bank of Ontario, Lindsay, for the Bank of Upper Canada, as the place for payment. The application was made some time before the day appointed for payment.

VANKOUGHNET, C.—You can take the order ; but as you are altering the place for payment, you must appoint a new day, and serve the order.

## BURFORD v. LYMBURNER.

*Final order for sale.*

In applying for a final order for the *sale* of mortgaged premises, it is necessary that the usual affidavit of the plaintiff should negative possession and the receipt of rents and profits.

This was an application for a final order for the sale of mortgaged property. The affidavit of the plaintiff, as to the non-payment of the mortgage money, did not negative possession or the receipt of rents and profits.

SPRAGGE, V. C.—The affidavit of the plaintiff should negative possession and the receipt of rents and profits.

Order refused.

## BAIRD v. WHITE.

*Amendment by way of supplement.*

Apart from any general orders, this Court has power to permit an amendment of its own records; so that, though the order of 6th June, 1862, may not provide, in some exceptional cases, for the introduction into a suit of matter arising subsequent to its institution, such matter may be ordered to be introduced upon motion for leave to amend the bill.

This was an application by *Blake*, on motion, for leave to amend the bill. The bill was filed by Baird, a judgment creditor of the defendant White, alleging that White was entitled to certain land, subject to a charge thereon in favor of one Gemmill, a co-defendant, who had the legal title, and that there was money overdue to Gemmill, and praying to be allowed to redeem him, and for payment by *White* of the amount of the redemption money, and of the judgment, interest, and costs; and in default, a sale. Subsequent to the filing of the bill, the plaintiff purchased the interest of Gemmill, who had thereupon conveyed the legal estate to him, and the amendments sought to be introduced were (amongst others) to set up this conveyance, and to compel specific performance of the contract, or in default rescission or sale, Gemmill to be made a co-plaintiff. The defendant White had filed a disclaimer.

It was objected, on behalf of White, that the only Orders authorising the amendment of bills were Order IX., sec. 14, and the Order of the 6th June, 1862; that Order IX., sec. 14, did not apply to amendments rendered necessary by reason of events arising subsequent to the institution of the suit; that the Orders of 6th June, 1862, did not provide for such a case as the present, and that the plaintiff must therefore file a new bill; or if the Order of 6th June, 1862, did provide for such a case, that then the application here was unnecessary, as the order asked could be obtained in *præcipe*. It was also objected that the proposed amendments would change the nature of the suit, from an ordinary one by a judgment creditor to enforce his judgment, to one for specific performance.

VANKOUGHNET, C.—This court has power, apart from any general orders, to direct an amendment of its own records; the order to amend may therefore go as asked.

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NOTE.—See *Crawford v. Bradburne*, *post* p. 280, and *Montreal Bank v. Auburn Exchange Bank*, *post* p. 283.

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#### WINTERS V. THE KINGSTON PERMANENT BUILDING SOCIETY.

*Sheriff's poundage—Con. Stats. U. C., c. 22, sec. 271.*

The plaintiff had obtained a decree in this cause against the defendants, by which money was ordered to be paid, and on which the plaintiff issued execution and lodged it in the hands of a sheriff. After seizure under the writ, but before the money was levied, the defendant moved for and obtained (see *ante* p. 214) leave to re-hear the cause, and a stay of the execution, on the terms of paying the money into court, which was done; *Held*, that the sheriff, not having actually levied the money under the execution, was not entitled to poundage, but to fees only for services actually rendered, to be settled by a judge in chambers.

A decree had been pronounced herein in favor of the plaintiff, directing the defendants to pay him a certain sum of money and his costs of the suit. Execution had been sued out by the plaintiff to enforce the payment of these amounts, and placed in the hands of the sheriff of Frontenac; after the sheriff had seized under the execution, but before any sale had taken place, or any money been

levied, the defendants moved for (see *ante* p. 214) and obtained leave to re-hear the cause, and the execution had been stayed on the terms of paying the money into court, and the costs to the plaintiff's solicitors, they undertaking to repay them if the decree should be reversed. The money and costs had been duly paid accordingly, and a re-hearing had taken place, and the decree been upheld; and now the sheriff presented his petition, praying payment, by the defendants, of his poundage on the money and costs.

*S. H. Blake*, for the petitioner. The sheriff is entitled to poundage if goods are seized and the money made, though the money be not paid to him or pass through his hands.—*Morris v. Boulton*, 2 U. C. Com. Law, Chas. R. 60, 67, 70; *Thomas v. Cotton*, 12 U. C. Q. B. 148; *Brown v. Johnson*, 5 U. C. L. J. 17.

*Sullivan* contra. The application is improperly made by the sheriff; the sheriff's remedy is against the plaintiff, not the defendants. The case of *Morris v. Boulton* was decided on the authority of English cases which have since been overruled on this point, by the case of *Miles v. Harris*, 31 L. J. C. P. 361; 6 L. T. N. S. 649.

*S. H. Blake*, to cure the objection as to the mode of the application, appeared for the plaintiffs also, and consented to the order going,

*VANKOUGHNET, C.*—The execution having issued out of this court under the decree originally made in the cause, the sheriff seized under it certain mortgages of the defendants for the purpose of making the money. The defendants thereupon presented a petition for re-hearing and applied to have execution stayed in the meantime. Both applications were granted on the defendants paying into court, as they subsequently did, the full amount of the debt, interest and costs, not including the sheriff's fees or poundage, as to which no provision was made. The petition of re-hearing was dismissed, and the money in court paid out to the plaintiff. The sheriff now presents a petition, asking that the defendants may be ordered to pay his fees and poundage upon the money brought into court, alleging that he would

have made that money under the writ in his hands, had not its execution been stayed by the order of this court. Independently of the statute to which I shall presently advert, there seems to have been no settled notion, as to the practice which prevails here in similar cases at law. *Morris v. Boulton*, 2 Com. Law, Chambers Reports, 60, before *Burns*, J. decides, that, under such circumstances as the present, the sheriff is entitled to poundage; see on the same subject *Brown v. Johnson*, 5 U. C. L. J. 17; *Thomas v. Cotton*, 12 U. C. Q. B. 148. The language of the two judges, *Erle*, C. J., and *Willes*, J., who expressed their opinions on this question in the recent case of *Miles v. Harris*, 31 L. J. C. P. 361, is not quite reconcilable, although they concurred in judgment. The 271st section, however, of the Common Law Procedure Act, ch. 22, of the Con. Stats. of U. C., which assumes to condense and explain, though it materially alters in this respect, the provisions of the Statute 9th Vic., ch. 56, sec. 2, enacts, that "In case the real or personal estate of the defendant be seized or advertised on an execution, but not sold by reason of satisfaction having been otherwise obtained, or from some other cause, and no money be actually levied on such execution, the sheriff shall not receive poundage, but fees only for the services actually rendered; and the court out of which the writ issued, or any judge thereof in vacation, may allow him a reasonable charge for any service rendered in respect thereof, in case no special fee be assigned in any table of costs." The practice of this court is, by statute, made analogous to that at law, on proceedings by execution. It seems plain, therefore, under the clause of the statute just quoted, that the sheriff is not entitled to poundage, but only to fees for services actually rendered, to be fixed by the court or a judge in Chambers. The words, "money actually levied," contrasted with the preceding words, mean, I think, money actually obtained by the sheriff himself, out of the goods. There would have been a difficulty in the application at the instance of the sheriff, had not the plaintiff appeared in support of it. The immediate remedy of the sheriff is ordinarily against the party who sets him in motion, and the plaintiff might have made such arrangements

with the defendants as would have deprived him of any right, and the sheriff of any right in his name, to proceed against them. The plaintiff, however, consenting, and the proceedings having been stayed for the benefit of the defendants, let the petition stand over with liberty to the sheriff to produce before me evidence, to satisfy me what charges it would be reasonable to allow him, for his action in the matter, and for the recovery of these he may be allowed to proceed on the execution which is now in abeyance.

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#### GALBRAITH v. GURNEY.

##### *Postponement of examination and hearing.*

The fact that a defendant in a cause has, since the filing of the bill, temporarily left the jurisdiction of the court, is no ground for postponing the examination of witnesses and the hearing of the cause.

This was an application by *Hoskin* for a postponement of the examination of witnesses, and hearing of the cause, till the term next after the one ensuing, on the ground that the defendant had, since the bill was filed, left Canada for England, it being alleged that he would return in time for the hearing, if postponed. The application was opposed on the ground that the proposed delay would be prejudicial to the plaintiffs.

**VANKOUGHNET, C.**—I do not think it a sufficient ground for an application of this nature, that a party to the suit chooses, after bill filed, to leave the country and not attend to the suit; if he is obliged to go out of the country, he should leave instructions as to the conduct of the suit. It is immaterial whether the plaintiff would be prejudiced by the delay or not, as a plaintiff has a right to prosecute his suit as speedily as he can, if he has a cause of action.

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## CRAWFORD V. BRADBURN.

*Amendment of bill.*

The court will not grant leave to amend a bill, where the proposed amendment would render the bill of a different nature.

This was an application for an order to amend the plaintiff's bill. The facts appear in the judgment.

SPRAGGE, V. C.—The bill as it stands is by a mortgagee against a mortgagor to foreclose, it is now discovered that there was a conveyance by the mortgagor to his son, and the amendment asked, is to impeach this conveyance, as void under the 13th Elizabeth, adding the son as a party, and making all the necessary allegations to bring the case within the statute ; this seems to me more than a mere amendment, the added party would be the substantial party, and the bill would be of a different nature. See *Smith v. Smith, G. Cooper*, 141 ; *Smith's Ch. Pr.* 6 ed. 351.

Order refused.

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ROBSON V. REESOR.*Service of bill by publication.*

The court will permit service of a bill by publication (under sec. 8 of Order IX.) upon a defendant in a foreclosure suit, who has left the jurisdiction, though the defendant sought to be advertised, is merely an incumbrancer by virtue of a subsequent mortgage.

This was an application by *Taylor* for leave to serve the bill by publication, upon a defendant who had left the jurisdiction more than two years before the filing of the bill. The suit was for foreclosure, the defendant who was asked to be advertised, being a subsequent mortgagee.

SPRAGGE, V. C., though at first doubting whether sec. 8 of Order IX., applied to the case of service of the bill on a party defendant, other than the mortgagor or his assignee, after consultation with the other members of the court, held that it did, and granted the order as asked.

## MCINTYRE v. KINGSLEY.

*Guardian ad litem to lunatic—Evidence of lunacy.*

On an application to appoint a guardian *ad litem*, to a person alleged to be of unsound mind, not so found by inquisition, it is not sufficient evidence of the fact of lunacy, that deponents swear that the person is of unsound mind, or that they believe him to be so; such facts should be shewn, that the court may judge for itself, whether the person is of unsound mind or not. It must also be shewn that the proposed guardian has no interest conflicting with that of the lunatic.

This was an *ex parte* application by *Downey* for an order to appoint a guardian *ad litem* to a defendant alleged to be a lunatic not so found by inquisition. An affidavit was read of a medical man, shewing that he had attended on the alleged lunatic for some time, and believed him to be of unsound mind, and other affidavits of persons acquainted with him were read, to the same effect. *Smith's Ch. Pr.*, 7th ed., 487, was cited. The application was made on behalf of the lunatic, and the person sought to be appointed was one *Hoover*, a friend of the lunatic.

**SPRAGGE, V. C.**—The affidavits do not give any facts shewing the person to be of unsound mind, they only shew that the persons swearing to them believe him to be so, the affidavits should state such facts, from which the court may judge for itself, whether the person is unsound or not.

For the purpose of declaring a person a lunatic and vesting the control of all his affairs in the hands of a committee, the affidavits must shew particularly all the facts evidencing the insanity; so when a guardian *ad litem* is appointed, the management of his affairs, *pro tanto*, is taken out of hands and the same particularity in the affidavits is required.

Order refused.

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**NOTE.**—The application was renewed on fresh affidavits, which were held sufficient as to the fact of lunacy, but it was again refused, as it was not shewn that the proposed guardian had no interest in the suit adverse to that of the lunatic. An affidavit as to this, by the person acting as solicitor for the lunatic, was procured, and the application being thereupon again renewed, was then granted.

## WALLACE v. FORD.

*Stay of proceedings or dismissal of bill—Subject matter of suit gone.*

An order will not be granted to stay proceedings or dismiss the bill in a suit merely because the subject matter of it has gone; the plaintiff has a right to proceed to a hearing to shew himself entitled to costs.

This was an application by *Fitzgerald* on petition, to stay proceedings or to dismiss the plaintiff's bill, on the ground that the subject matter of the suit has been sold under a paramount mortgage with power of sale, it being contended that it was therefore useless to proceed any further with the suit.

*McGregor* contra.

**SPRAGGE, V. C.**—The plaintiff may go on for his costs, he must be permitted to shew that he had a right to file his bill, even though the subject matter of the suit is gone; suppose the subject matter of a suit were destroyed by fire before hearing, it surely could not be contended, that the plaintiff should therefore lose his costs of the suit, so far as it had gone.

Application refused with costs.

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NOTE.—See *post* p. 287.

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## CHALMERS v. PIGOTT.

*Opening foreign commission.*

It is not necessary to obtain an order for leave to open a foreign commission which has been duly returned. The proper practice is to open it without order in the presence of all parties.

This was an application, on behalf of the defendant, for an order for leave to open a foreign commission which had been duly returned executed. *Neale v. Withrow*, 4 U. C. L. J., 88, was cited.

**SPRAGGE, V. C.**, after conferring with the Registrar: I am informed that the practice has been upon the return of a foreign commission to open it without order in the presence of all parties. The order asked for is therefore unnecessary.

## MONTREAL BANK v THE AUBURN EXCHANGE BANK.

*Amendment of bill in respect of matter arising subsequent to the filing of it.*

The plaintiffs had obtained a judgment at law against P., one of the defendants, upon confession, and, as judgment creditors under that judgment, had filed their bill to set aside a prior judgment of other defendants, and had moved for and obtained an injunction to restrain a sale of the goods of P. under such prior judgment. After the injunction had been granted, the plaintiffs obtained another judgment against P., not upon confession, but by default. Under these circumstances, a motion for leave to amend the bill, by alleging the recovery of the second judgment, was granted.

*Hoskin* for the plaintiffs, moved, on notice, for leave to amend the bill.

The facts are fully set out in the head note and judgment.

*E. B. Wood* contra, for the Auburn Exchange Bank. Pitts, the judgment debtor on the judgment on confession, was insolvent at the time, the judgment is therefore invalid against the defendants, under Consol. Stats. U. C., ch. 26, sec. 17, and now the plaintiffs seek, by their amendment, to rest their case, and to support their injunction upon a state of facts which did not exist when this bill was filed, or the injunction granted. The plaintiffs have no right, by amendment, to make a new bill, or put a different face upon the original bill. He cited 1 Daniel's Ch. Pr., American ed. 475. (a)

*Hodgins* for the other defendants, contra. The proposed amendment is not within the General Orders, sections 15 and 16 of the Orders of June, 1863, being abolished, and no provision being substituted for such a case as the present. The plaintiff must file a new bill.

*Hoskin*, in reply, cited *Baird v. White*, *ante* p. 275.

**SPRAGGE, V. C.**—The plaintiffs are judgment creditors upon a judgment obtained by confession against the defendant Pitts, and impeach a judgment obtained by the defendants, the Auburn Exchange Bank, on the ground

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(a) On this point reference may also be made to the case of *Crawford v. Bradburn*, *ante* p. 280.

that the negotiable paper upon which the latter judgment was recovered was not the paper of the judgment debtor, but forgeries. The plaintiffs ask to amend, by stating the recovery of another judgment, recovered against Pitts, not upon confession, but by default, upon paper of Pitts, which matured subsequently to the recovery of the former judgment. The plaintiffs have obtained an injunction, restraining a sale of Pitt's chattels upon a judgment of the Exchange Bank. It is said, in answer to the application, that if the plaintiffs are right upon the bill as framed, the decree will set aside the judgment impeached, and the chattels seized under it will be left free to satisfy the plaintiffs' judgments, the second as well as the first; that the issue raised by the plaintiffs is, that certain paper upon which the Exchange Bank had recovered judgment is forged, and that whether the plaintiffs have recovered one judgment or two can make no difference upon that issue; that their case is just as strong upon the one judgment as upon several, so that the proposed amendment is unnecessary for any legitimate purpose, and it is suggested that the real object of the amendment is this: Pitts, it is alleged by the answer, was insolvent when he gave the confession in the plaintiffs' suit, and the answer sets up that it was void and invalid, and ineffectual to support the plaintiffs' judgment under the Fraudulent Preference Act, so that the plaintiffs had no *locus standi* in this court upon that judgment, and it is suggested that the object of the amendment is, to support the case and the injunction granted, upon the second judgment, in case the first should fail, and to obtain a decree to continue the injunction upon a cause of suit which arose after the granting of the injunction. On the other hand, the reason for resisting the amendment obviously is, to shew the plaintiffs out of court in the first place, so that the question of forgery will not arise at all. Upon the whole, I think it will be conducive to the ends of justice to allow the amendment. If I do not allow it, and the plaintiffs should be advised that it is doubtful whether the recovery of the judgment upon the confession will support their case, they will be put to file another bill upon their second judgment, in which the same issue of

forgery will be raised, and so additional litigation will be occasioned. In granting it, I do not prejudice the Exchange Bank if the paper they hold is not forged, and if it is forged, they ought not, by their judgment and execution, to disappoint legitimate creditors. In regard to their objection to the judgment upon cognovit, I will only observe that the statute makes it void, when given by an insolvent, only against creditors, and it may be doubted whether the objection will lie on the part of the Exchange Bank, in a suit where the question is, whether they are creditors or not. The point of insolvency is open to this observation: Pitts, it is said, is insolvent or not, according to whether he is liable or not, upon the paper held by the Exchange Bank; in other words, he is solvent if the paper is forged. In a suit in which the question of the forgery is in issue, can the Exchange Bank shut out the inquiry as to the forgery, by shewing that, assuming there is no forgery, Pitts was insolvent. I do not decide either of these points, (for they will arise at the hearing,) but throw them out for the consideration of the parties; I do not know whether the judge who hears the cause may take the same view; I may change it myself upon further consideration; and I think it reasonable that the plaintiffs should be permitted to proceed upon their second judgment, as well as the first. I feel that, technically, it may be open to some objection, for it is not supplemental to the present cause of suit, it is rather an additional cause of suit, as in a bill by a mortgagor, his obtaining, after bill filed, an assignment of another mortgage; but, unlike that case, it entitles the plaintiff to no additional relief. It is not to be disguised, that it is unnecessary if the first judgment is sustained, but that could be no objection if it were not subsequent to the filing of the bill; my impression is that under our orders that is not an objection. If I refuse the application, I must put the plaintiffs either to proceed upon the first judgment alone, at the risk of the defendants' objection being sustained, or to file a second bill to obtain the same object. If they proceed upon both, and fail as to the first judgment, it may be proper that the costs so far incurred, or a portion of them, should be disallowed to the

plaintiffs, but that will be a proper question for the court at the hearing.

Order granted without costs.

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### RUTTAN V. SMITH.

*Enlargement of motion.*

Where a party moving is not in a position to sustain his motion, the court will not grant an enlargement so as to enable him to place himself in a position to sustain it; the motion must lapse.

In this case the party moving appeared and stated that the notice of motion had been sent for service to a sheriff; that he believed the service had been duly effected in time, but the papers had not been returned by the sheriff, and he therefore, not being in a position to prove the service, asked a short enlargement to enable him to do so. No one appeared on the other side.

SPRAGGE, V. C.—It is the practice of this court not to grant an enlargement where the party moving is not in a position to sustain his own motion; it was so settled long ago against the intimation of my own opinion, as I thought it might be a hardship in many cases, but it is now settled, and the motion must therefore lapse.

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### WRIGHT V. MORROW.

*Order for a married woman to answer separately.*

Where the plaintiff applies for an order against a married woman to answer separately, on the ground that the time for the joint answer of herself and husband has elapsed and no answer has been filed, he must shew that the case is a proper one for such separate answer.

This was an application by Crickmore on behalf of the plaintiff, or an order for a married woman defendant to answer separately. The husband was a co-defendant, and had been served with the bill, and the time for answering had elapsed, and no answer had been filed. The interest of the married woman in the subject matter of the suit was not shewn.

SPRAGGE, V. C.—You must produce an office copy of the bill to shew the nature of the interest of the married woman, so that I may see that it is a proper case for a separate answer.

Order refused.

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NOTE.—Similar decisions were given by his Honor a few days subsequently in the cases of Heward v. Tcherburt and Meredith v. Martin.

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### WALLACE v. FORD.

#### *Amendment of bill.*

The plaintiffs filed their bill to impeach a conveyance of lands in N. to the wife of one of the defendants; in describing the lands by metes and bounds, by mistake only a portion of the lands in N. were included, which portion was afterwards lost to the parties by being sold under a power contained in a mortgage. Under these circumstances a motion for leave to amend the bill, by inserting the property in N., not included in the former description, was granted.

This was an application by *McGregor*, on behalf of the plaintiffs, for an order to amend their bill under the circumstances stated in the head-note and judgment.

*Fitzgerald* contra.

SPRAGGE, V. C.—The plaintiffs file their bill as assignees, for the benefit of creditors of all the real and personal estate of the defendant Orris Ford, and state that in the execution of their trust, they sold and conveyed to one Ormiston, among other lands, the lands of Orris Ford, in Newmarket, assigned to them, and the bill then proceeds to describe the lands in Newmarket conveyed, and describes only a portion of the lands in Newmarket. The bill charges that Orris Ford, who was occasionally employed by the assignees in the execution of the trust, purchased from Ormiston the lands so conveyed with moneys of the estate, and procured them to be conveyed to his wife. The answer of Orris Ford sets the plaintiffs right as to the description of the property, and the plaintiffs now seek to amend, by describing the property as the whole property conveyed to Ormiston. It is objected that the plaintiffs seek by their

amendment to introduce another property beyond that in their bill, the parcel described by metes and bounds having been lost to the estate by a sale under a power contained in a mortgage. I think the proposed amendment is not open to this objection ; the transaction intended to be impeached is obviously the purchase from Ormiston of the lands conveyed by him, namely, the Newmarket lands, and the plaintiffs merely misdescribe them, *i. e.*, describe a portion by metes and bounds when they supposed they were describing the whole. There has been some delay in making the application, but the plaintiffs may have apprehended that an amendment made before last sittings would throw them over, and they may have been willing to proceed without amendment rather than have the delay. The cause having been postponed at the instance of the defendant, they now prefer to amend, and I think they should be allowed to do so. It is suggested that the costs of this application and of the application of the 15th be set-off, or rather that costs be given upon neither : I approve of this.

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NOTE.—See *ante* p. 282.

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### FOLLIS V. TODD.

*Staying suit till security given for the costs of a prior suit at law.*

The plaintiff (a vendor) had sued at law to recover the purchase money due under an agreement for the sale of lands, but had failed, and the costs of the action were given against him; the defendant (the vendee) issued a *fi. fa.* goods to recover the costs, which was returned *nulla bona*. Afterwards the vendor filed his bill in equity to enforce specific performance of the contract. On motion of the defendant in the suit, the proceedings in equity were stayed till security for the costs at law should be given.

This was a suit by a vendor to compel specific performance of an agreement for the sale of land to the defendant. It appeared that the plaintiff had brought an action at law to recover the purchase money, and had failed by reason of the agreement (which was under seal) containing the usual receipt for the purchase money, though it was not actually paid. The costs at law were given against the plaintiff, and the defendant had issued a *fi. fa.* goods for them, which had

been returned *nulla bona*, and they had not been paid. Under these circumstances *Fitzgerald* moved on behalf of the defendant (who had not answered) for an order to stay the proceedings in equity until security for the costs at law should be given. Counsel contended that the suits were substantially for the same matter, namely, to enforce the payment of the purchase money; that it was a rule both at law and in equity that where a suit was instituted the costs of a former suit respecting the same matter should be first paid. (*Spires v. Sewell*, 5 Sim. 193; *Montgomery v. Johnson*, 9 Ir. Eq. 221; *Budge v. Budge*, 12 Beav. 385.) And further, that if the two suits had been contemporaneous the plaintiff would not have been allowed to proceed in both courts, but would have been put to his election. (*Barker v. Smark*, 3 Beav. 64.)

*H. Murray*, contra. The suits are not for the same matter; the bill in equity alleges fraud, which was not an ingredient in the suit at law. He cited *Street v. Ryckman*, 1 Grant 215; *Wild v. Hobson*, 2 V. & B. 108-9-10; and *Little v. Wright*, in this court (not reported) before V. C. *Spragge*, 9th March, 1861.

*Fitzgerald* in reply. The bill was filed after judgment at law, and merely asks a personal order for payment against the vendee; it does not even pray a sale, but merely that a lien may be declared until the money be paid; the suits are therefore substantially the same. The plaintiff is insolvent, and the costs of the suit will be lost if the motion is refused. He mistook his forum and should suffer for it.

After taking time to look into the authorities, his Honor Vice-Chancellor *Spragge* said, the reason on which the present application is rested is, that the cause of action at law and in this court is the same; and, in opposition to the motion, the plaintiff contends that the only relief the defendant could have had would have been an order to elect in which court he would proceed, had both suits been proceeding at the same time, and *Wild v. Hobson*, 2 V. & B. was referred

to as an authority for this position; *Wild v. Hobson* is an old case, and since that was decided the practice has been very much extended.

In *Street v. Ryckman*, 1 Gr. Ch. R. 215, the same question was raised, and in disposing of that case the late learned Vice-Chancellor, at page 217, is reported as having said, "The question arose for the most part in actions of ejectment, and it is obvious that a particular reason exists for applying the rule to cases of that description, inasmuch as a verdict in one action of ejectment is no bar to another, and such actions may in fact be brought *ad infinitum*. The principle, however, is not confined to actions of ejectment, and it is applicable to suits in equity as well as to actions at law, although they may be instituted in different courts."

*Barker v. Smark*, (3 Beav. 64,) was a case of election; there an action at law was pending for the recovery of the purchase money, and a bill had also been filed in Chancery to enforce the lien, and Lord *Langdale* put the party to his election. The principle upon which the present application is made, and of putting a party to his election, are the same, and are founded on Lord *Bacon's* ordinance, that no one shall be doubly vexed for the same cause.

*Holbrooke v. Cracrost*, referred to in the note to *Pickett v. Loggon*, (5 Ves. 706,) is an instance of proceedings in one court being stayed until the costs of a suit in another court were paid; in that case the proceedings in Chancery were stayed till the costs of a suit for the same cause of action in the Exchequer were paid.

It is true that in this case the plaintiff's equity is clear, if the allegations in the bill are true; and if true, the defence at law was an unrighteous one; but the defendant swears to merits, and upon this application I cannot go into the merits of the case. I think the proper conclusion is, that proceedings in this suit should be stayed until security be given (security, not payment, is asked by the notice of motion) for the payment of the costs of the action at law; that is, security to pay them if not disposed of in this suit.

## FORD v. JONES.

*Final order for sale.*

On an application for a final order for the sale of mortgaged property, it is not sufficient for the plaintiff in his affidavit of non-payment to swear merely that he has not been in possession or in the receipt of rents and profits; he must also negative possession and the receipt of rents and profits by any one on his behalf.

This was an application on behalf of the plaintiff for a final order for the sale of mortgaged property. The plaintiff, in her affidavit as to non-payment, swore simply that she had not been in the possession of the property or in the receipt of rents or profits, but did not negative possession or the receipt of rents and profits by any one on her behalf.

SPRAGGE, V. C.—The plaintiff should also negative possession and the receipt of rents and profits by any one on her behalf.

Order refused.

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## ANDERSON v. ANDERSON.

*Examination de bene esse.*

An order to examine a witness *de bene esse* on the ground of illness, will not be granted *ex parte* unless the illness is dangerous: if there is no immediate danger, notice should be served.

This was an *ex parte* application by *Burns* for an order to examine a witness *de bene esse* on the ground of the illness of the witness. An affidavit of the medical man in attendance was read, shewing the fact of illness, and that the witness could not be moved without danger to his life. It was not shewn, however, that there was any immediate danger of death. *Snelling and Jones' Orders*, p. 244, were cited.

SPRAGGE, V. C.—It does not appear that there is any immediate danger of death, you must therefore give notice, but I grant leave to give short notice for to-morrow.

## MERKLEY v. CASSELMAN.

*Order nisi for non-production in the Master's office.*

Where, on an application against parties who had been ordered to bring in accounts in a Master's office, for an order *nisi*, on the ground that the accounts brought in were insufficient, it appeared that the insufficiency consisted in the items of the accounts being undated, the order *nisi* was refused. In such case, before applying for an order *nisi*, a warrant should be obtained from the Master, calling upon the parties to bring in better accounts.

This was an *ex parte* application by *Snelling*, on behalf of the plaintiffs, for an order *nisi* against the defendants, who were accounting parties, as executors, and had been duly directed by a Master to bring in their accounts. It appeared from the Master's certificate that the defendants had filed accounts, but that they were insufficient, in that the items were all undated.

SPRAGGE, V. C.—I think before such an order is made, the Master should issue his warrant, calling upon the defendants to bring in better accounts, to give them an opportunity of correcting what was probably an accidental omission.

Order refused.

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**ANONYMOUS.**

*Leave to encumbrancer to prove claim—Petition—Notice of motion.*

Where an encumbrancer has neglected to appear in the Master's office to prove his claim, within the proper time therefor, and applies to the court for leave to come in, the application is more properly made on notice of motion than by petition.

This was an application for a *fiat* on a petition by an encumbrancer, who had been made a party in the Master's office, for leave to come in and prove his claim before the Master, he having neglected to do so within the proper time.

SPRAGGE, V. C.—A petition is not necessary, although

it may be used; a notice of motion is sufficient. I do not like proceeding by petition, as being expensive. I will grant you the *fiat*, but I doubt if the costs of a petition are taxable.

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### WATSON v. HAM.

*Notice to party required to give evidence.*

Where a party to a suit, having no solicitor, is required to attend before a Master, to be examined, it would seem that forty-eight hours' notice thereof should be given to him.

This was an application by *S. H. Blake*, for an order against the defendant to attend before the Master at Whitby, at his own expense, and submit to be examined. It appeared that the party in question had no solicitor; that he had been served with a subpoena, requiring him to attend before the Master at Whitby on a certain day, being the day after service, to be examined, but that he had not attended. It was contended that though the time was short the party should have attended at least, and have objected to the shortness of the notice, and not have disobeyed the subpoena.

**SPRAGGE, V. C.**—It would seem reasonable to give a party, who has no solicitor, the same time as would be given to a solicitor, if he had one. The party is entitled to have counsel present at his examination, and some time would be required to instruct one. The case of a witness is different; he does not require protection, but a party to the suit does.

Order refused.

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### DICKEY v. HERON.

*Form of jurat to affidavit.*

The omission, in the jurat to an affidavit, of the name of the deponent, vitiates the affidavit.

This was an application on behalf of the defendant to set aside an order.

*S. H. Blake* contra, objected that the name of the deponent to one of the affidavits filed in support of the application, was omitted in the jurat.

SPRAGGE, V. C., decided that the omission was fatal, and that the affidavit, consequently, could not be read.

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#### BANK OF UPPER CANADA V. NICHOL.

*Dismissal for want of prosecution.*

Where a suit is partially abated by the death of one of the defendants, the other defendants cannot move to dismiss the bill for want of prosecution; the proper course is to move that the plaintiff do revive within a limited time.

This was an application on behalf of the defendant Nichol, to dismiss the plaintiffs' bill for want of prosecution.

*S. H. Blake* contra, objected that another defendant to the suit had died, causing an abatement of the suit, and that therefore the motion was not a proper one. He cited *Harvie v. Ferguson*, decided by *Vankoughnet*, C., not reported, on this point.

In reply, *Hall v. Green*, 2 U. C. Jurist, 42, was cited.

SPRAGGE, V. C.—In *Harvie v. Ferguson* there was a motion to dismiss in an abated suit, and the Chancellor refused to allow it to be turned into a motion to compel the plaintiff to revive within a limited time, which is, as I understand the practice, the proper motion. The application must therefore be dismissed, but without costs, as *Hall v. Green* is in favor of the defendant's application, and *Harvie v. Ferguson* is not reported on the point in question.

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NOTE.—In Smith's Ch. Pr., 7th ed., p. 547, it is laid down that "If one of two or more defendants dies, the suit only abates as to that defendant, and the other defendants are, when otherwise in a situation, entitled to move to dismiss, notwithstanding such partial abatement, although the court, upon the coming on of the motion, may take that circumstance into consideration." The above decision would, therefore, seem to conflict with the English practice on the point, as stated by Mr. Smith.

## WATSON V. HAM.

*When suit in court—Death of defendant before bill served—Revivor.*

If a sole defendant dies before the bill is served upon him, there is no suit in court, the plaintiff, therefore, cannot revive, and if he take out an order to revive under such circumstances it will be discharged with costs.

This was an application by *J. C. Hamilton*, on behalf of the representatives of the deceased defendant, to set aside an order to revive the suit, for irregularity. It appeared that the plaintiffs had filed their bill against the deceased defendant, but that, afterwards, and before the bill had been served upon him, he had died. The plaintiffs had thereupon obtained on *præcipe* the common order to revive against the representatives of the defendant deceased, which was now sought to be set aside.

*S. H. Blake*, for the plaintiffs contra, contended that service of the bill was not necessary to constitute a suit, that the mere filing was sufficient. He cited *Crowfoot v. Mander*, 9 Sim. 396; and *White on Revivor and Supplement* pp. 5, 6, 132-3.

*Hamilton* in reply. An order to revive cannot be obtained if a defendant dies before answer, *Snelling and Jones' Orders*, p. 49.

*VANKOUGHNET, C.*—In this case the bill was filed, but before it was served, or the party named in it as defendant had appeared, he died; there was but one person named in the bill as defendant. The plaintiff has taken out an order to revive, and it is moved to discharge this order with costs, inasmuch as there was no suit in court to revive, the defendant having died as stated, and I think the motion must succeed. When the defendant died there was no suit in court, there was nothing to revive; if there had been another defendant who had been made a party to the suit, so that it was now retained in court as to him, then the order to revive would, I think, have been proper as a substitute under our general orders for an original bill by way of revivor, and as

supplemental. But here there was no suit in court, the person named as the defendant being dead without having been made a party to it.—*Ashbee v. Shipley*, (6 Mad. 298,) *Bland v. Davison*, (21 Beav. 312,) *Foster v. Foster*, (16 Sim. 637,) *Crowfoot v. Mander*, (9 Sim. 396,) *Hardy v. Hull*, (14 Sim. 21,) *Lash v. Miller*, (4 DeG. M. & G. 841,) *Anon.* (3 Atk. 486,) *Williams v. Jackson*, (5 Jur. N. S. 264,) *Watts v. Watts*, (Johns. 631,) *Martin v. Purnell*, (3 W. R. 395,) *Smith's Ch. Pr.* 7 ed., pp. 801-2, 807; *White on Rev. and Sup.* pp. 6, 132-3; *Calvert on Parties*, p. 92, *Spencer v. Wray*, (1 Vern. 463;) *Morgan's Orders*, 509.

Order discharged with costs.

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NOTE.—Reference may also be made to *White on Rev. & Sup.* p. 21, and the cases there cited, and to the form in the Appendix No. III.

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#### RUTTAN V. SMITH.

*Order to amend without prejudice to order pro confesso.*

Where an order to amend has been taken out, but through inadvertance, not without prejudice to an order *pro confesso* previously obtained, the court, if the case is a proper one to have granted an order to amend without prejudice in the first instance, will grant such an order *nunc pro tunc*, so as thereby to revive the order *pro confesso*.

It appeared that an order *pro confesso* had been obtained against Rogers, one of the defendants, who was resident out of the jurisdiction, and that afterwards the common order to amend had been taken out, whereby the order *pro confesso* was gone, and an application was now made, that the order to amend should be without prejudice to the order *pro confesso*, *nunc pro tunc*, so as to revive the order *pro confesso*. It was contended that the order to amend would have been without prejudice in the first instance if such had been applied for, and that the plaintiff should not suffer from an inadvertence in not having made the application therefor.

*Mowat, V. C.*—I am informed by my brother *Spragge* that it has frequently been held, that, where an order to

amend might originally have been granted without prejudice to an order *pro confesso*, it may be granted *nunc pro tunc*, after the order to amend is made, and I have stated to him the amendments made herein, (which I assume to be those in blue ink in the draft,) and he thinks the order would have been without prejudice if desired, and may be in that form now.

Order granted.

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### HENDERSON v. COWAN.

*Final order for foreclosure.*

A motion for a final order for the foreclosure of mortgaged property is an *ex parte* proceeding, it is unnecessary to serve notice thereof even on infant owners of the equity of redemption who have answered.

This was an application for a final order for foreclosure. It appeared that notice of the application had been served on the defendants, who were infant heirs of the mortgagor, and had duly answered through their guardian *ad litem*, it being thought that the bill not being *pro confesso* it was necessary to serve notice, but

MOWAT, V. C., in granting the order, remarked that the service of notice was unnecessary.

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### SHANAHAN v. FAIRBANKS.

*Leave for further time to answer.*

An application for further time to answer will not be granted *ex parte*, notice should be served upon the plaintiff.

This was an *ex parte* application by *Fitzgerald*, on behalf of the defendant, for further time to answer. It appeared that the time for answering would expire on the next day.

MOWAT, V. C.—You must give notice, but as the time expires to-morrow, you may give short notice for that day.

## MALLOCK V. PLUNKETT.

*Dismissal of bill for want of prosecution—Undertaking to speed.*

It is now the settled practice of the court, (until altered by General Order,) to accept an undertaking to speed, upon a first motion to dismiss for want of prosecution, and in cases where it would have been accepted prior to the establishment of hearing Circuits.

This was an application on behalf of the defendant to dismiss the plaintiff's bill for want of prosecution. It appeared that this was the first application of the kind.

*Fitzgerald* for the plaintiff, offered an undertaking to speed.

**MOWAT, V. C.**—The Chancellor, it seems, has always refused to accept an undertaking to speed, as not applicable to the practice since hearing terms have been established. The Vice-Chancellors, on the other hand, have always accepted such an undertaking, under the same circumstances as it would have been accepted before hearing terms were established. On conferring with the Chancellor and my brother *Spragge*, we have agreed not to accept an undertaking to speed for the future. We all agree that this would be the best rule to adopt, though the judges differ as to whether it can or cannot be adopted without a General Order. A General Order will be formally promulgated after the Christmas vacation. Under these circumstances, as my decision of the point on which the other judges differ cannot have any effect in future cases, I have not thought it my duty to form any independent opinion upon it, but finding that two judges have ruled that the old practice, as to the acceptance, as of course, of undertakings to speed in a case like the present, should be pursued, and that one judge has ruled otherwise, I think it will be proper for me, on the present occasion, to follow the decision of the two Vice-Chancellors, and without forming any independent opinion as to which decision was the correct one.

## Usual order on undertaking.

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NOTE.—See the cases of *Ruttan v. Burnham*, *ante* p. 191, and *Thompson v. Hind*, *ante* p. 247.

## MCNAIR v. SIMPSON.

*Vesting order granted ex parte.*

Where a party to a suit is directed by decree or order to execute a conveyance to another party, but cannot be found after due diligence, and the deed therefore cannot be tendered for execution, a vesting order will be granted *ex parte*.

This was an *ex parte* application by *Spencer* on behalf of the plaintiff for a vesting order. It appeared that the defendant had been ordered to execute a conveyance to the plaintiff, but that the plaintiff was unable to find him after due diligence, and could not therefore tender the deed for execution.

MOWAT, V. C.—*Boulton v. Stegman*, Chancery Chambers Rep. 199, seems an authority that no notice is necessary. The order may go accordingly.

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NOTE.—An application exactly similar was granted *ex parte* on the 12th April, 1864, by his Honor V. C. *Spragge*, in *Henry v. Graham*.

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## SHERWOOD v. CAMPBELL.

*Abortive sale—Re-sale.*

Where property has been put up for sale under an order of the court, but the sale has proved abortive for want of bidders, the property may be advertised and put up for sale again without further order.

This was an application on behalf of the plaintiffs for a re-sale; the defendant had been notified but did not appear. It was shewn that an order for sale had been granted, and the property duly advertised and put up for sale, but that the sale had proved abortive for want of bidders.

MOWAT, V. C.—A decree was made for the sale of the mortgaged premises: the sale was advertised, but no one bid. The application now is for an order for a re-sale, but this seems unnecessary. In *Smith's Ch. Pr.* 7th ed. 1002, it is stated that if any of the lots remain unsold the same may be re-sold at a future time without further order. This

refers to the practice before the Chief Clerk, but the practice is the same before the Master. See Smith, Ch. Pr. 2nd ed., pp. 184 and 215.

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NOTE.—It appearing afterwards that the order had been for a sale before a judge, an order for a re-sale before the Master was granted.

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### MURRAY v. VANBROCKLIN.

*Stamps to deeds executed in England.*

Deeds executed in England, for the purpose of conveying land situate in this Province, do not require to be stamped under the provisions of the English Stamp Acts, but are valid in this Province though unstamped.

This was an application by *S. H. Blake*, on behalf of the plaintiffs, for an order for the payment out of court of the purchase money of the property sold in the cause.

*E. B. Wood* for the purchaser, objected that one of the deeds in the chain of title was executed in England, (the property conveyed being in Upper Canada,) and that the deed was not stamped in accordance with the English Stamp Acts. He contended that under the provisions of those acts the deed was void in England, and being void where executed, was void everywhere, and that, therefore, the purchaser could acquire no title to the property sold. He cited Story's Conflict of Laws, sec. 631; *Clegg v. Levy*, 3 Campbell 167; *Alves v. Hodgson*, 7 Term Rep. 241; *Stonelake v. Babb*, 5 Burr. 2674; *Bristow v. Sequeville*, 5 Exch. 275; *James v. Catherwood*, 3 Dow. & Ryl. 190. He consented to the order going if the deed should be held to be valid.

*S. H. Blake*, in reply. The English Stamp Acts do not render an unstamped deed void, but merely inadmissible in evidence in the courts there; the acts impose a penalty for not stamping deeds, if this penalty were paid, deeds previously inadmissible would thereupon become valid and admissible, which would not be so if the deeds were void.

*MOWAT, V. C.*—If reference is made to sections 260 and 318 of Story's Conflict of Laws, it will be clear that the learned author considered that, according to the laws of

England and America, deeds relating to land, executed in a foreign country, are valid, though not stamped according to the laws of the foreign country. Mr. *Wood*, who is objecting to the title, said, that the question is, whether deeds are in England wholly void for want of a stamp, or merely cannot be given in evidence; that the validity of the deed in the present case depends on this question. Now I have looked through the English Stamp Acts, and I do not see that deeds are declared absolutely void for want of a stamp; on the contrary, they may be stamped after execution, on payment of a penalty, (13 and 14 Vic., ch. 97, sec. 12,) and in *Bristow v. Sequeville*, 5 Exch. 278, *Alderson*, B., said, "It is very different whether the law makes a stamp necessary to the validity of an instrument, or to its admissibility in evidence. An unstamped deed is a valid contract here, though it cannot be given in evidence. If by the law of a foreign country, a document is only inadmissible for want of a stamp, it is a valid contract, and receivable in evidence in our country." The observations of Baron *Rolfe* are to the same effect; he puts the case as absurd "that if a document were properly stamped according to the law of this country, it could not be given in evidence here because it was improperly stamped according to the law of a foreign country where it was given." What the stamp act I have referred to provides is, that unstamped deeds shall be inadmissible. The language of section 12 is this, "No such deed or instrument shall be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, until the same shall be duly stamped in manner aforesaid." To hold that such a deed is valid here, where the property lies, quite accords with the settled principle that one country does not regard the revenue laws of another; stamp duties are imposed for revenue purposes, and no other. I am of opinion that the deed is valid, though not stamped, and as it refers to land in Upper Canada, I am not sure that I should have come to a different conclusion as to its validity, even if it had appeared that unstamped deeds were wholly void in England, instead of being merely inadmissible as evidence until stamped.

Judgment in favor of the title.

## ROBINSON v. DOBSON.

*Service of order for married woman to answer separately.*

At the time of serving an order to answer separately on a married woman, the original order should be shewn, and the fact should be sworn to in the affidavit of service, otherwise an order *pro confesso* will not be granted.

This was an application by *Foster*, on behalf of the plaintiff, for an order *pro confesso* against a married woman. It appeared that she had been served with the bill and the order to answer separately, and that the time for her answer had elapsed, but the affidavit of service of the order did not state that at the time of service the original order had been produced and shewn to her.

SPRAGGE, V. C.—The original order should be shewn at the time of service, and the affidavit should state this.

Order refused.

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RADCLYFFE v. DUFFY.

*Final order for foreclosure.*

Where, on an application for a final order for foreclosure, the usual affidavit of non-payment is made by the agent of the plaintiff, the authority of the agent need not be produced: as to that, it is sufficient for him to swear that he is the duly authorized agent.

This was an application by *Cattanach* for a final order for foreclosure. The plaintiff being in England, the usual affidavit as to non-payment was made by his agent, who swore that he was duly authorized under power of attorney to receive the mortgage money in the cause. The power of attorney was not produced.

MOWAT, V. C., at first doubted whether the power of attorney should not be produced, but after consulting with his Honor V. C. *Spragge*, held it to be unnecessary, and granted the order as asked.

## PURDY v. FERRIS.

*Dismissal of bill on præcipe—Costs in cause.*

Where a defendant serves a notice of motion, but before the return thereof the plaintiff takes out on *præcipe*, and serves an order to dismiss his bill, the defendant cannot bring on his motion, but he is entitled to tax his costs thereof, under the order to dismiss, as costs in the cause.

This was an application on behalf of the defendants, for a foreign commission to examine a witness in the United States.

It was stated on the other side, that an order to dismiss the plaintiff's bill had been taken out on *præcipe*, and served that morning.

In reply it was contended that the defendant had a right to bring on his motion for costs, *Spooner v. Payne*, 17 L. J. ch. 130, being cited, but

*Mowat, V. C.*, declined to hear the application, as the suit was out of court, and as the defendant was clearly entitled to tax the costs of his motion under the order to dismiss, as costs in the cause.

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## EVANS v. EVANS.

This case (reported *ante* page 248) was brought before the full court, by way of appeal from the order made in Chambers, and his Honor *V. C. Spragge* then said, that since giving his judgment he had conferred with one of the common law judges, and had been informed by him that it was now the practice at law to grant the costs of a garnishee application, where there was a sufficient fund out of which to pay them, and he accordingly, in conformity with his opinion, as expressed in Chambers, concurred with his Lordship the Chancellor, in reversing his previous decision.

Order below reversed accordingly.

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## MERRILL v. ELLIS.

In this case (reported *ante* p. 268) the remarks of his Lordship the Chancellor were misunderstood, and it has

since been discovered that his Lordship's judgment was, that if the answer had been properly sworn to, he would have granted the application without costs, but as it was not, he would grant it only on the terms of paying the costs of the application, and of the order *pro confesso*.

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### O'HARA v. CUTHBERT.

*Appointment of new trustees—Security.*

Where this court appoints new trustees under a will (the former ones being dead or insolvent) it has no authority to require the new trustees to give security for the due performance of their duties.

This was an *ex parte* application (the bill being *pro confesso* against all the defendants) by *J. C. Hamilton*, on behalf of the plaintiff, for an order appointing new trustees. By the decree in the cause it was referred to a judge in Chambers to appoint new trustees in the place of two executors and trustees under a will, one of whom had died, and the other had become insolvent, and left the province. It was contended that the proposed trustees could not be required to give security for the due performance of their duties. *Simpson v. Burton*, before his Honor *V. C. Esten*, not reported, was cited.

*VANKOUGHNET, C.*, held, following the case cited, that the court had no authority in such case to compel the new trustees to give security, and granted the order as asked.

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### IN RE CROOKS, &c., SOLICITORS, &c.

*Time for the service of notice of motion—Sunday.*

There must be two clear days between the service of a notice and the day for hearing the motion, and in the computation thereof Sunday is not to be reckoned.

This was an application by *Cattanach* to set aside an order for taxation of costs, taken out by a client on *præcipe*. It appeared that the notice of motion had been served on a Saturday, for the following Tuesday.

*Carruthers* contra, objected that the Sunday was not to be computed in the time for service, and that therefore sufficient notice had not been given. He cited Order 39 of June 1853, sec. 2.

*Cattanach*, in reply, cited *Sprague v. Henderson*, *ante* p. 213.

**VANKOUGHNET**, C., held, in accordance with the section of the General Order, that Sunday was not to be computed, and that therefore sufficient notice had not been given, but as Mr. *Cattanach* had been misled by the case cited, his Lordship merely directed the motion to stand till Wednesday without costs.

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NOTE.—This case partially overrules *Sprague v. Henderson*, *ante* p. 213.

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#### IN RE THE METHODIST EPISCOPAL CHURCH PROPERTY IN THE VILLAGE OF CHURCHVILLE.

*Property of religious institutions—Con. Stat. U. C., ch. 69.*

Land vested in trustees for the use of, and as a place of residence for, a minister of a religious body, and for such other purposes as the ministers of such religious body, at their general conference, might from time to time appoint, is not "land held by trustees for the use of a congregation or religious body" within the meaning of Con. Stat. U. C., ch. 69, and this court has, therefore, no power to sanction the execution of any deed conveying such land by the trustees.

This was an application on behalf of trustees, to obtain the sanction of the court to the execution of a deed, under Con. Stat. U. C., ch. 69, sec. 10. The facts appear fully in the judgment.

**MOWAT, V. C.**—The trustees hold this property not directly "for the use of a congregation or religious body," (these being the words employed in the statute,) but in trust "for the exclusive use and accommodation of, and as a place of residence for, any minister or preacher of such church, regularly ordained, licensed, or authorized to perform the duties of minister or preacher within the circuit wherein the said lands and premises are contained, by the ministers and preachers of the said church, at their general conference, and for such other purpose or purposes as the said ministers

and preachers may, from time to time, at their several conferences, determine, appoint, or ordain." Now, the statute does not give the powers described in it, in the case of property conveyed for any religious purpose, or any religious trust; but one class only of such trust property is provided for, namely, property held "for the use of a congregation or religious body," and accordingly it is provided that before any deed is executed, "the congregation or religious body, for whose use the lands have been held, shall be duly notified thereof." I cannot suppose that the statute was intended to include property conveyed in trust for the minister for the time being, for then I must hold that the trustees and congregation might, if they chose, sell such property, even against the will of the minister. Under such a trust it is the minister who, for the time being, is principally and directly interested in the property, and the congregation is only interested in it indirectly. Then again, this deed expressly authorizes the property to be applied to any other purpose by the conference. A sale without their authority would be a most objectionable proceeding, which I do not think the statute contemplated. What is the extent of the other purposes to which the conference may direct the property to be applied it is not necessary now to consider. Again, I see nothing whatever in the statute or the deed that would justify me in holding that the official members of the Brampton circuit, by whom this sale has been sanctioned, can be deemed to be the "congregation or religious body for whose use the lands have been held," or that their approval can be accepted as dispensing with the notice which the statute requires to be given to such "congregation or religious body" before the deed is executed. The advertisement also did not comply with the directions of the act, for it did not contain the terms of the sale. Possibly the parties may find that an act of parliament will be necessary to enable them to effect the sale, if the sale is really desired by all parties, and beneficial to all, as I presume it is. But however this may be, I think I have no alternative but to refuse the present application.

## McMURRICH v. HOGAN.

## PERKINS v. PLEBS.

*Absconding defendants.*

Where an application is made to advertise an absconding defendant, the affidavits must shew whether he has any relations in the country; if he has any, one or more of them should, generally speaking, be examined as to their knowledge of his residence before the order is applied for.

These were applications for orders to serve the bill by publication on defendants, alleged to have absconded.

MOWAT, V. C.—The defendant is said to have absconded, and an application is made under the 7th section of the 9th Order of June 3rd, 1853, for liberty to proceed by advertisement. There has been no examination of his relations, as to their knowledge of his residence, and I find on inquiry that by the practice this is, generally speaking, necessary, as stated in Mr. Taylor's book. The defect must be supplied before the order can be granted.

In McMurrich v. Hogan a similar application is made, and the affidavits do not shew whether the defendant has any relations in the country. This defect must be supplied, and if he has relations, one or more of them must be examined as to the defendant's residence.

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NOTE.—See also on this point Irving v. Strait, *ante*, p. 185.

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## BIGELOW v. THOMPSON.

*Dismissal for want of prosecution—Costs.*

Where, on a motion to dismiss for want of prosecution, the only objection made was that the costs of a demurrer overruled had not been paid, the court dismissed the bill with costs, the costs of the demurrer to be set off, and execution to go for the balance in favour of the party entitled thereto.

This was a motion on behalf of the defendant, to dismiss the plaintiff's bill for want of prosecution.

On the other side it was objected that the defendant moving had not paid the costs of a demurrer which had been overruled with costs. *Harvie v. Ferguson*, *ante* p. 218, was cited. No other objection to the motion was made.

VANKOUGHNET, C., held that *Harvie v. Ferguson* was decided on a different principle, namely, that a motion could not be made till the costs of a prior one, *respecting the same matter*, were paid, and his Lordship granted the order dismissing the bill with costs, against which the costs of the demurrer were to be set off, and execution to go for balance in favor of the party entitled thereto.

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### ROLFE V. COOTE.

*Partition—Consent relieved against—Motion to set aside a Master's report—Chambers application.*

In a partition suit, a gentleman who was not a solicitor, nor a clerk of any solicitor in the cause, was employed by the defendant's solicitor to attend to the case for the defendant, and gave a consent in good faith, but inconsiderately, and without the knowledge or authority of, or communication with, the defendant or his solicitor, to a mode of partition suggested by the opposite party.

*Held*, that the consent might be relieved against on terms, it not appearing that the plaintiff would thereby be prejudiced.

*Held*, also, that an application for relief against the consent, and to set aside the report, was properly made in Chambers, and not in Court.

This was a motion on the 14th of January, 1865, by *Roaf*, on behalf of W. Coote, one of the defendants, for an order to relieve against a consent, and set aside a report of the Master at London made thereupon, on the ground that the party served with the warrant, and who attended on the proceedings in the Master's office on behalf of William Coote, and gave the consent, had no authority from him to do so. The facts of the case appear fully in the judgment.

*F. T. Jones* for the plaintiff, contra, objected that the motion being to set aside a Master's report should be in Court, and not in Chambers. He cited *Ledyard v. McLean*,

and Fitzgerald v. The Upper Canada Building Society, *ante* page 183, and Gould v. Burritt, *ante* page 250.

*Roaf* in reply. There is nothing in the application in the nature of an appeal from a Master's decision; the question as to the authority of the person attending on behalf of William Coote was not adjudicated upon by the Master. The application is a mere matter of practice, and therefore properly made in Chambers. He cited *Scripture v. Curtis*, before *Spragge*, V. C., 13th June, 1861, and *Dillabough v. Nicholson*, before *Vankoughnet*, C., 18th of May, 1864, not reported.

*Mowat, V. C.*—The allegation of the defendant is that the person served with the warrant was not his solicitor, or clerk of his solicitor, or authorized in any way to act for him, yet he received the papers, attended, and gave a consent. The question is, whether he was authorized to do so, and this question was not before the Master. I think this is not in the nature of an appeal, and may, therefore, be heard in Chambers.

An enlargement was then asked, for the purpose of answering the application, which was granted, and the matter afterwards came on to be argued on the merits.

*Roaf.* There is no practice of this court authorizing service of papers upon a clerk outside of the office of the solicitor, nor has a solicitor any right to waive the service of papers in his office. There is no evidence to shew that Sydere was acting apart from Partridge, or in any way except as his clerk: the service of the warrant is therefore bad. The consent should also be relieved against, and the report and all subsequent proceedings set aside, on the ground that Mr. Sydere was not authorized to act for Coote after he left Mr. Partridge's office, the partition made being unfair to Coote. The evidence on these points as to the want of authority of Mr. Sydere, and the unfairness of the partition, is in favour of the applicant.

*D. E. Blake*, contra. The applicant cannot complain of any

irregularity in the service of the warrant, as none is complained of in his notice of motion; he comes here asking the indulgence of the court, and which, if granted at all, will only be upon terms. Sydere had been the managing clerk of the real solicitor; he was not articled to Glass, in whose office he was, when he was served with the warrant, and attended, and gave the consent. It is also shewn that he had for six years collected the rents of the property for Coote: the inference, therefore, is that Sydere was the person who was really retained by Coote, and that Partridge got the suit through Sydere being in his office; Sydere, throughout the suit, had had the exclusive management of it. Certain stipulations were inserted in the decree by his consent, which could not have been done otherwise. It is also shewn that a consent partition had been discussed by Sydere and Coote before the service of the warrant. As to the partition itself, the balance of testimony is in favor of its justness and fairness; if anything, it is rather in Coote's favor than otherwise, the yard attached to the property being in common, which would give Coote more than his proportionate share. The cases shew that the consent of a managing clerk is binding upon the client. See *Connatty v. O'Reilly*, 11 Ir. Eq. 333; *Chown v. Parrot*, 14 C. B. N. S. 74; *Young v. Power*, 9 L. T. N. S. 176; *Peed v. Cussen*, 4 Dru. & War. 199. *Furnival v. Bogle*, 4 Russ. 142, is distinguishable. But even if the consent was not originally binding, we must presume it was communicated at once to Coote, and the delay which has taken place amounts to an acquiescence. If the client is prejudiced he has his remedy against the solicitor. If the solicitor is insolvent the court will, no doubt, relieve under circumstances where it would not otherwise; but here there is no question as to the solvency of the solicitor, or that there will be any difficulty in recovering damages from him.

*Roaf.* This case is distinguishable from those cited; there the consent was deliberately given, and by duly authorized solicitors, or their clerks; but here the consent was given on the spur of the moment, no time being given

to the clerk to obtain information, or confer with the client. As to the partition being fair, it will be seen that the staircase leading to the upper portion of the premises allotted to Coote, by being within the portion allotted to the plaintiff, cannot be used by Coote, and there will be no access to the upper portion except by the rear.

MOWAT, V. C.—This is an application by the defendant, William Coote, to be relieved from a consent given in his name, before the Master at London, and to set aside the Master's report, which was founded on the consent.

The decree was for the partition of certain leasehold property, and for an account of any repairs or lasting improvements which had been made upon it by the plaintiff. Only two warrants are spoken of in the affidavits as having been taken out under the decree, and both were served on Mr. Arthur Sydere; the first was a warrant to consider, and the second was a warrant to proceed with the reference. Both warrants were attended by Mr. Sydere, as representing the defendant; and on the return of the warrant to proceed, he gave the consent which is complained of.

The solicitor whom the defendant employed was Mr. Partridge; Mr. Sydere was at the time a temporary clerk in his office, (not paid or articled,) and was not then, nor is he yet, a solicitor. Mr. Partridge undertook the defence, but for some reason or other not satisfactorily explained, he got another solicitor, Mr. Cornish, to allow the name of the latter to be used, instead of his own, as the defendant's solicitor, and he gave the actual conduct of the defence to Mr. Sydere. This gentleman shortly afterwards left Mr. Partridge's employment, and engaged as clerk with another solicitor in the same city, but he still, with the consent and approbation of Mr. Partridge, retained the management of this defence. Mr. Partridge frankly enough states that he himself knew nothing of the practice, and took none of the proceedings in the cause, but left every thing to Mr. Sydere and his Toronto agent. So entirely was this understood between them that, when Mr. Sydere was served with the warrant to proceed, he did not even communicate it to Mr. Partridge.

He did not communicate it to the defendant either. He did mention it to Mr. John Coote, the defendant's brother and agent, but he told him at the same time, quite honestly I am sure, that nothing important was to be done upon it, he thought. So far, however, was this from turning out to be the case, that on the return of the warrant, Mr. Sydere consented to a plan for the partition which was proposed at the same time by the plaintiff; and thus, on the occasion on which he thought nothing important was to be done, he actually disposed of the principal object of the suit in the absence of the defendant, and without his knowledge or authority, and without the knowledge of either Mr. Partridge or Mr. Cornish. Mr. Sydere had not, up to this time, ascertained, nor did he know, the views of the defendant as to what division of the property would be just or desirable; nor had Mr. Partridge communicated to Mr. Sydere any opinion on the subject. The consent was, on the occasion referred to, suggested to Mr. Sydere by the plaintiff's solicitor in good faith, as I have no doubt, and was given by Mr. Sydere ~~in~~ like good faith, according to what seemed to him fair, judging chiefly from the *ex parte* statements of the plaintiff, in connection with what Mr. Sydere happened to know of the property himself.

The defendant had not the opinion of any counsel or solicitor in reference to the consent, and was entirely without the professional protection to which, in so important a matter, he was entitled, and on which he was relying. He had no opportunity, either, as he ought to have had, of presenting to the Master his own views, or of giving any evidence in support of them; and he had not even an opinion of Mr. Sydere formed deliberately, or with a knowledge of the views of the defendant, or of any one on his behalf. The whole question of partition was practically withdrawn from the Master, and settled, on the impression made at a moment by the plaintiff and his solicitor, on a young man not yet a member of the profession, and not employed by the defendant to act for him. The uninstructed and hastily formed opinion of a law student, on the *ex parte* statements of the opposite party, was suddenly and unexpectedly substi-

tuted for the deliberate judgment of the Master, to be formed after fully hearing both parties and their solicitors and evidence. Mr. Partridge swears that he would not have given the consent if he had known of it in time; and Mr. Sydere swears that, in consenting, he overlooked, as might have been expected, several important considerations, which he sets forth. Both, as well as the defendant and a witness, concur in stating on affidavit that the partition consented to is an unfair partition; but the plaintiff and several witnesses state on oath an opposite opinion, and I have not attempted to determine the comparative weight that ought to be given to these contradictory views.

The question now is, ought the defendant to be held to the consent given in his name under the very peculiar circumstances which I have mentioned?

The general rule is stated in Lush's Practice, 2nd ed., page 182, to be that "the client is bound, as between him and his opponent, by any act which the attorney does in the regular course of practice and without fraud or collusion, however injudicious that act may be;" and I am satisfied there was no fraud or collusion in the present case; but there are decisions and dicta which indicate that a court may sometimes relieve a party against an attorney's consent, even where no case of fraud or collusion is made out; as, where there has been gross misconduct on the part of the solicitor, (Per Baron *Bayley*, in *Thomas v. Hewes*, 4 *Tyrr.* 342, 2 *C. & M.* 519,) or where the consent was given contrary to the express wishes of the client, (*Swinfen v. Swinfen*, 24 *Beav.* 549, *S. C.* 2 *DeG. & J.* 381;) or where the consent was given on information which turns out to be erroneous, (*Butter v. Ommanney*, *Tam.* 344;) or was founded on a clear mistake or misapprehension of rights, (*Peed v. Cussen*, (4 *D. & War.* 210;) or was given in ignorance of facts which it was essential to know, in order to a due exercise of proper discretion, (*Furnival v. Bogle*, 4 *Russ.* 142;) and it was, I think, admitted on the argument before me that the court might relieve against a consent improperly given, if the solicitor who gave it was insolvent.

But it would be impossible to say that even in such cases as I have suggested, the courts have always relieved, or would

always relieve. The difficulty of interfering is, on the one hand, always increased where the position of the opposite party has been so changed by acting on the consent that he cannot, if it is relieved against, be restored to as favorable a position as he was in before the consent was given; and the difficulty is, on the other hand, diminished, if the relief would not unfairly prejudice the opposite party. In the present case, the affidavits suggest no reason for holding that the plaintiff would be placed under any unjust disadvantage if the application which is made should be granted. The consent was given by a clerk; and there are some matters which, no doubt, a managing clerk has power to consent to, so as to bind his principal, and to bind his client; such, for example, as occurred in *Young v. Power*, (9 L. T. N. S. 176.) So where the clerk immediately communicates what he has done to the principal, and the latter does not, within a reasonable time, object to it, as in *Furnival v. Bogle*, 4 Russ. 142. But no case was cited to me in which it has been held that the implied authority of a managing clerk is necessarily co-extensive, for all purposes, with that of the solicitor himself. The contrary seems to have been held by *Littledale*, J., in *Hodson v. Drewry*, 7 Dowl. Pr. 571; *Greenwood v. Titterington*, 9 A. & E. 699. It is not to be forgotten, either, that Mr. Sydere was not the clerk of the defendant's solicitor, whether Mr. Partridge or Mr. Cornish is to be treated as filling that character, and was not managing the case under any real supervision by either.

On the whole, considering all the facts I have mentioned, and further considering that an action against the solicitor would obviously be an uncertain and inadequate remedy, I would, I think, be going farther against the defendant than the authorities demand or warrant, if I should refuse his application, unless the delay which has occurred is an answer to it.

Then, as to the delay: the consent was given on the 8th of November, and it does not appear how long afterwards, or in what way, Mr. Partridge became aware that a partition had taken place by consent. He must have known

it before the report was signed ; but so little interest was he taking in the conduct of the defence that he did not inquire or ascertain what the division was, or how it came about, and seems to have been under the impression that it had taken place with the consent of the defendant himself. Accordingly, he was pleased, as I gather from his evidence, that an amicable and a mutually satisfactory partition had been brought about, after all the litigation between the parties, and was surprised, as he tells us, when he afterwards found, on speaking of it to John Coote, that the brothers knew nothing about the matter. It was John Coote who communicated what had taken place to the defendant. This was on the 24th of November, three days after the report was signed. The report was not filed immediately, but the exact day of filing it does not appear. The defendant was at first advised that his remedy to get rid of the consent was by shewing the facts on an appeal from the Master's report ; and he gave a notice for this purpose on the 7th of January, which is admitted to have been in time. Finding that he could get no relief in that form, he changed his solicitor, and on the 14th of January gave notice of his present application. I think that, under all the circumstances, it would be treating him with undue harshness to hold that this delay is a sufficient answer to his application, if an earlier application would have succeeded.

I shall, therefore, grant the motion, but it can only be on paying the plaintiff all the costs he has incurred since the 8th of November, inclusive ; and including the costs of the present application. Mr. Partridge is not a party to the motion, and I cannot, in his absence, order the costs to be paid by him.

## HARE v. SMART.

*Married woman—Pro confesso.*

An order to take a bill *pro confesso* against a married woman is now unnecessary.

This was an application for an order *pro confesso* against a married woman, who had been ordered to answer separately.

MOWAT, V. C.—An application is made for an order to take the bill *pro confesso* against one of the defendants, a married woman, who had been ordered to answer separately, but I think that the case of a married woman is within the 19th of the New Orders, and that no order is necessary.

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NOTE.—A similar decision was given on the 24th March, 1865, by his Lordship the Chancellor, in Wallbridge v. Cochrane, the ground of the decision being, that after an order to answer separately, a married woman is looked upon as a *feme sole* in regard to the suit.

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### ANDREWS v. MAULSON.

*Trust deed—Release clause.*

Where a trust deed for the benefit of creditors contains no release clause, creditors who subsequently sue the settler on other securities are not thereby precluded from claiming the benefit of the trust deed.

A creditor who had not come in, pursuant to advertisement, was allowed to do so after the Master had reported as to the debts, and after a decree on further directions had been made, but he was required to pay all costs of and incidental to his application.

This was a petition of one P. W. Taylor, to be let in to prove his claim in the Master's office, after the Master's report and the decree on further directions had been made. The facts appear fully in the judgment.

Crickmore for the petitioner.

*Hodgins contra.* The petitioner has sued upon his debt, and also brought a suit for sale in this court, and by so doing he acted adversely to the trust deed, the benefit

of which he is now asking to come in and share; this the court will not permit. See *Joseph v. Bostwick*, 7 Grant, 332.

**MOWAT, V. C.**—The petitioner is assignee of a mortgage given by the plaintiff. The plaintiff afterwards, namely, on the 28th of July, 1854, executed a deed, purporting to convey all his property in the city of Toronto to the defendant, Maulson, in trust, amongst other things, to pay all the plaintiff's debts. By the decree, which was pronounced on the 28th of April, 1859, such of the trusts of this deed as related to the payment of debts were ordered to be carried into effect; and with this exception the deed was set aside. The Master was directed to take an account of the debts. This he did in the usual manner, and on the 21st of May, 1860, he made his report. The decree on further directions is dated the 8th of December, 1860; and an order for the sale of part of the property was made on the 3rd of December, 1861. On the 9th of May, 1862, a creditor, Mr. Blevins, who had not come in under the decree, obtained an order to be allowed to prove; and the petitioner now applies for similar leave.

The petition is opposed, chiefly on the ground that the petitioner brought an action at law on the covenant in the mortgage, and also took proceedings in Chancery for the sale of the mortgaged property, after the trust deed had been executed; and that he continued these proceedings up to a very late date. *Joseph v. Bostwick*, 7 Grant, 332, was cited to shew that the petitioner had, by these means, precluded himself from claiming the benefit of the trust deed.

The order which was made on Mr. Blevins' petition seems an answer to this objection, for he, too, had taken proceedings after the execution of the trust deed, and had continued them until a short time before he presented his petition, nor did he allege ignorance of the trust deed, or even of the decree.

The trust deed in *Joseph v. Bostwick* contained the usual clause for the release of the debtor by the creditors;

and what the court held was, that creditors who had brought actions against the debtor, and otherwise actively opposed themselves to the trust deed, could not afterwards participate in its advantages. Here, however, the deed contains no release clause ; and no provision in it has been pointed out to me as having been violated by the petitioner. The effect of the deed, as construed by the court, at the hearing, rather appears to be to give to creditors an additional security, without interfering with any remedies they might already have, for their debts. It is to be observed, too, that the deed did not profess to convey Andrews' personal estate, or any lands he might have out of Toronto.

It is stated by Mr. *Hodgins*, in his affidavit, that all the land which is saleable under the former deed has been sold, and that the suit is nearly wound up ; and it is argued that, under these circumstances, and at this late stage of the cause, the petitioner cannot be let in ; but the cases appear to be against this view. In *Lashley v. Hogg*, 11 Ves. 602 ; Lord *Eldon* said, "The court will let in the creditors at any time while the fund is in court ;" and *Angell v. Haddon*, 1 Madd. 529 ; *Gillespie v. Alexander*, 3 Russ. 130 ; *Greig v. Somerville*, 1 R. & M. 338 ; are strong illustrations of the rule.

Mr. *Hodgins*, in his affidavit, further says, that the money in court is not more than sufficient to pay the debts already proved, and the costs. In that case the petitioner may gain nothing by being let in, especially as I think he must pay all the costs of and incidental to the application ; but under all the circumstances, I think that, if he wishes it, the order should go.

The petition has been served on the plaintiff only ; but, as the learned counsel who appeared in support of the petition only claimed any balance that might remain after paying the debts already proved and the costs, I do not see that service on any one but the plaintiff ought to be required.

## TYLEE V. STRACHAN.

Previously to the orders of the 6th of February, 1865, there did not exist any rule or practice of the court limiting a time within which a plaintiff was bound to serve a copy of his bill on the defendant; where, therefore, a bill was filed on the 30th of June, 1863, and an office copy not served until the 16th of January, 1865, a motion to set aside the service of the bill, on the ground of irregularity, and to declare the cause out of court, was refused with costs.

This was an application on the 26th of January, 1865, on behalf of the defendant, for an order to set aside the service of the bill, on the ground of its having been made more than eighteen months after the filing of the bill.

*Roaf* for the defendant. The service is bad, as so much delay has taken place. In England, by an order of court, passed in 1845, the time for service of the bill is twelve weeks from the filing; prior to that, and under the old practice of bill and subpoena, there was no *lis pendens*, that is, the suit was not completely in court till the issue of a subpoena; the mere filing of the bill was not sufficient. The subpoena when issued, which was in term, was always made returnable for the next term; if not served before then a new subpoena was issued, and the *lis pendens* would only date from the issue of the last subpoena. In this province the filing of the bill has the same effect as the issue of the subpoena formerly had. The bill should, therefore, be served before the term next following, or at least the one after that. He cited 1 Daniell's Chancery Practice, American edition, 498; edition of 1851, page 15; Morgan's Orders, 69; Smith's Chancery Practice. 7th edition, pages 115, 362, 372.

*J. A. Boyd* contra. In the case of *Donovan v. The Niagara District Building Society*, on the 15th of December, 1862, his Lordship, the Chancellor, overruled a similar objection to the one now made. Under the Common Law Practice the summons has to be served within six months; if not then served, it can be renewed on *præcipe*. If so renewed, the suit is kept alive from the beginning, so as to save the

Statute of Limitations. *Cusack v. Fury*, 1 Wallis and Lyne's Rep. 332. The words of the Old Orders of this court, of Vice-Chancellor *Jamieson*, as to the issue of subpœna are, that upon filing the bill the plaintiff "shall be entitled to a subpœna, returnable immediately." He was not obliged to issue his subpœna, so now he is not obliged to serve his bill. The passage cited in Morgan refers only to formal parties. He cited *Watson v. Ham*, *ante* page 295; *Braithwaite's Record and Writ Practice*, pages 29, 30, 31; *Coppin v. Gray*, 1 Y. & C. C. C. 209; *Maddock's Chancery Practice*, Vol. 2, 3rd edition, 245, and contended if there was any limit to the time for service of bill, it began to run not from the filing of the bill, but the making of the office copy, which of course could be done at any time.

*Roaf*, in reply, contended that at common law the suit was a *lis pendens*, so as to save the Statute of Limitations, only from the date of the renewal of the writ, not of the original one. See *Holman v. Weller*, 8 U. C. Q. B. 202.

**SPRAGGE, V. C.**—The bill in this cause was filed on the 30th of June, 1863. The office copy was issued on the 12th of January, 1865, and served on the 16th of the same month. This application is to set aside the service, by reason of the time which had elapsed between the filing and the service. It appears by affidavit that there has been no difficulty in serving the defendant at almost any time between the two periods.

The point is a very material one in this case, inasmuch as the time within which the plaintiff was bound to commence his suit in order to save the Statute of Limitations (or the time allowed by this court by analogy to the statute) has expired between the filing and service of the bill.

It is material to consider the effect of the filing of a bill in connection with the old practice. By Order 9 of the General Orders of 1853, the subpœna to appear and answer was abolished, and it was provided that the filing of a bill should have the same effect as the filing of a bill and the issuing of a subpœna to appear and answer theretofore had; and further, it was provided that in lieu of serving the

defendant with a subpoena, an office copy of the bill was to be served upon him, and that such service was to be effected in the same manner that service of a subpoena was then effected; and by subsequent Orders it is provided that the defendant is to answer or demur within a time limited, or that the bill might be taken *pro confesso*.

The effect of this, as compared with the former practice, was that the filing of a bill was made equivalent to the filing of a bill and the issuing of a subpoena; and the service of a bill was made equivalent to the service of a subpoena, consequently if, after the filing of a bill and the issuing of a subpoena at one date, the service of a subpoena a year and a half afterwards would be good service, I see nothing to prevent the service of a bill a year and a half after its filing being a good service.

At the date of the Order to which I have referred, no time was limited for the service of a subpoena, as computed from the filing of the bill, unless the rule enunciated in the anonymous case in Vernon, (1 Ver. 172,) applies. It is stated thus, "If a cause has slept twelve months in court, there shall be no proceeding had upon it without first serving a subpoena *ad faciendum attornat.*" Whether this applied only to a cause in which a subpoena had been served, or applied also to where the writ had only been issued, it shews the delay did not put the cause out of court; it had "slept," but was not dead, and might have been proceeded with by taking a course which has now long been obsolete.

The subpoena itself being returnable within the year, that is so many days after service, and in England not beyond the ensuing term, can make no difference, as there was nothing to prevent the issuing of an alias writ.

In England the service first of the subpoena, and then of the bill was limited by General Orders to a certain period after the filing of the bill; but these Orders are comparatively recent, and to decide this question we must look at the practice as it stood before they were passed.

To sustain the defendant's position upon this application, it must be shewn to be the practice that when in England a

bill is filed, and a subpoena issued, but no subpoena is served for a year, the bill itself becomes totally inoperative, and cannot be made the foundation of a subpoena issued or served after a year. I find no trace of any such rule in the English practice, but I find that which pretty well convinces me that before the late Orders no such rule did prevail in English practice.

In *Coppin v. Gray*, (1 Y. & C. Ch. 205,) the bill was filed on the 12th of February, 1834, and a subpoena was then taken out, but not served; this was equivalent to the filing of a bill under our practice, and a subpoena was served in August, 1836, two years and a half after the filing of the bill. The case made by the bill would have been barred in a few days after the filing of the bill. The point argued was whether the plaintiff's claim was barred by the statute. The precise point made upon this application did not come up, and could not, as the defendants had answered; but it was argued that the plaintiffs were barred because the subpoena was not served till August, 1836, and that it is the service of the subpoena, and not the filing of the bill, which prevents the operation of the statute. Sir *J. L. Knight Bruce* held that the statute was saved by the filing of the bill. Upon an argument by defendants' counsel, that a bill might be filed, nothing done upon it for a quarter of a century, process then served, and the Statute of Limitations excluded by the mere fact of the time of the filing of the bill, he observed, "In the first place, if there is any foundation for the argument, how are we to account for the silence of the books on a matter of such probably frequent occurrence?" He then refers to the courts of law being in substantially the same position, and then meets the case of hardship, put by the defendants, by observing that "in a case of gross or improper delay between the time of filing a bill, and any farther proceeding in the cause, on the part of the plaintiff, a court of equity does not require any such rule to enable it, in the exercise of the judicial discretion belonging to it, to deal effectually with such a plaintiff, and to provide amply for the protection of a defendant so circumstanced, making the case by his answer."

It appears to me almost certain that if such a rule as the defendant contends for had prevailed in England, the case of *Coppin v. Gray* would not have been entirely silent upon the subject. In the first place, such an application as is made in this case would in all probability have been made, and if omitted through negligence, so astute a judge as the learned Vice-Chancellor, who decided the case, would have met the argument of hardship not only as he did, but by pointing to the practice. Indeed the argument of the delay of a quarter of a century would have been contracted to some period less than a year.

In *Forster v. Thompson*, (4 D. & W. 303, 317,) before Lord *St. Leonards*, there was a long delay between the filing of a bill and the service of a subpoena, and *Coppin v. Gray* was referred to, and no intimation was made of the existence of such a rule of practice as is contended for in this case.

I must refuse the defendant's application, and with costs.

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#### IN RE THOMPSON.

#### BIGGAR v. DICKSON.

*Allowance to widow in lieu of Dower—Payment on account.*

In an administration suit the testator's widow agreed that the real estate should be sold free from her dower, and the Master by his report approved of this, but the sale was delayed at the instance of the creditors in order to obtain a better price; the widow therefore petitioned for payment of a small sum towards the allowance that might be made to her in lieu of dower; the creditors were too numerous to be all served with the petition, but many of them, including the plaintiff, having consented thereto, and there being no opposition, the court granted what was prayed.

This was an application on petition by the widow of the testator, for the payment of £40 out of the moneys in court to the credit of the cause, under the circumstances set out in the judgment; the petition had been served on the

executors and some of the creditors. The solicitors for the plaintiff and some other creditors consented to the order going.

MOWAT, V. C.—This is an administration suit. The testator's debts exceed his assets, real and personal. The Master, on the 16th of May, 1864, approved of an offer made by the testator's widow that his real estate should be sold free from her dower, a proper allowance being made to her in lieu out of the proceeds of the sales. The unsold real estate is sworn to be worth upwards of £5000 ; and the sale of it has been delayed at the instance of the creditors, with a view to a more favourable time for selling to advantage, but in the meantime the widow and five children of the testator are without any means of support. It appears also that she has received but \$1566 out of the estate in the seven years which have elapsed since her husband's death, (15th February, 1858). It does not appear what sums have been received by the trustees and representatives for rents during the period. Lumber to the amount of \$930 has been sold, of which \$740 is in court ; and there have been no other sales of real estate. The widow now petitions for payment of £40, out of the moneys in court, towards her allowance for dower, and her petition is consented to on behalf of the plaintiff, the executors, and of a large number of creditors who have proved under the decree. The creditors who have proved are far too numerous to be all served with the petition.

I have had some difficulty in acceding to the prayer, as it is not alleged that the sum asked for is already due on account of arrears ; and in the event, therefore, of the widow's death before sales are effected, the amount she asks for may possibly never become due. However, the amount is small as compared with the value of the property ; the plaintiff, who represents the general body of creditors in the conduct of the cause, is a consenting party to the petition ; no creditor who has yet been served with the petition makes any opposition to it ; the creditors who, by their solicitors, have consented, appear to be in the same

position as the creditors who have not been served, and what those consenting regard as right and for their interest in the matter may fairly be assumed to be right and for the interest of all. I have therefore come to the conclusion that I should treat the petition as having virtually the consent of all the creditors, and that its prayer should be granted.

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### THORNTON v. HOOKE.

*Consent of parties to a suit in person—Proof of.*

Where an order is moved for on the consent of parties in person, the consent must, as a general rule, be executed in the presence of a solicitor; and an affidavit from such solicitor must be produced verifying the execution and shewing that he read over and explained the consent to the parties before they signed it, and that they understood, or that the deponent believes they understood, its meaning and effect.

This was an *ex parte* application by *Evans*, on behalf of the plaintiffs, for a final order for foreclosure, under circumstances which are detailed in the judgment.

**MOWAT, V. C.**—In this case the subsequent incumbrancers have been foreclosed, and the plaintiff, the first incumbrancer, moves for a final order against the owners of the equity of redemption, on their written consent thereto. This consent was signed in the presence of a solicitor of the court, who makes an affidavit verifying the signatures, and states therein that he read over the consent to the parties and explained its effect to them. But the practice of this court has been to require not only that the affidavit should be by a solicitor of the court and should state what this affidavit does, but that it should further state that the parties understood (or as the deponent believes they understood) the meaning, object and effect of the consent before signing it. I do not think this assurance can be dispensed with. Even with it parties have considerably less protection than it has been thought necessary to give a defendant at law from whom a *cognovit* is obtained.

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**NOTE.**—See also on this point *Trueman v. School Trustees for Peel*, *ante* p. 256.

## NUDEL V. ELLIOTT.

*Administration order—Married woman.*

Where a married woman applied, as devisee and legatee, for an administration order, by motion, without bill, and it appeared that an award had been made, professing to determine all matters between the executor and the legatees interested in the estate, and it was said that the husband and wife had been parties to the reference, the wife acting therein through her husband as her agent, which they denied, *Held*, that the validity of the award could not be tried on the motion, and that a bill must be filed; more especially as other legatees, not parties to the motion, were interested in maintaining the award.

This was a motion against executors, on the part of a married woman by her next friend (she claiming as legatee and devisee) for the usual administration order, under Order XV., of the 3rd of June, 1853. The facts fully appear in the judgment.

*Fitzgerald*, for the applicant, read affidavits of herself and her husband, denying that the husband authorized any reference of the matters in dispute to arbitration, and denying that he had any express authority from the wife to do so; and he contended that, in the absence of any express authority, the husband had no power to bind his wife by a reference to arbitration, and that the award was therefore not binding upon the wife, and could not affect this motion.

*Taylor* contra, shewed that the husband and wife were living together, and that the arbitrator understood that he was acting throughout with the knowledge and concurrence of the wife; and he contended that the husband, as such, and by being employed by the wife to settle the affairs of the estate with the executors, was the general agent of the wife in respect of these affairs, and as such had power to submit the matters to arbitration; that the award was therefore binding upon the wife; or if there was any question as to its validity, that it could not be tried on a motion of this kind, but that a bill must be filed. He cited *Acaster v. Anderson*, 19 Beav. 161; *Smith v. Ward, Styles*, 351; *Bacon's*

Abridgment Arbitrament C.; McGill v. Proudfoot, 4. U. C. Q. B. 40; Watson on Awards, 2nd Ed., pp. 56, 57; Bate-man v. Countess of Ross, 1 Dow. 235; Story on Agency, sec. 6.

MOWAT, V. C.—This is a motion under the 15th of the General Orders of the 3rd of June, 1853, for the administration of the estate of John McIntosh. The application is made by Isabella Nudel, wife of John T. Nudel. She sues by her next friend, and claims to be a devisee and legatee under McIntosh's will. The debts of the testator have been paid. They are stated to have exceeded the testator's personal assets; the excess was paid out of the rents of his real estate, received by the executors.

The matters in dispute have already been investigated by P. McGregor, Esq., Barrister, at the instance of all the legatees and the executor. Mr. McGregor made an award which all parties, except Mr. and Mrs. Nudel, have acquiesced in. The Nudels deny Mr. McGregor's authority to arbitrate, and insist that all he was chosen to do was to ascertain, for the information of the parties, the amount the executor had received or might have received, and what the shares of the respective legatees were; and that he was not authorized to arbitrate upon them, or to pronounce a binding decision.

Mr. *Taylor*, for the executor, contended that the award is binding, and that its validity, if questionable, can only be impeached by bill. He cited *Acaster v. Anderson*, 19 Beav. 161, where the defence was a release, the validity of which was disputed, and the court refused to decide the question without a suit.

Mrs. Nudel acted in the matter through her husband, and I am of opinion, that, upon an application of this kind, I cannot, according to the settled practice, decide between the contradictory affidavits which have been made as to what Nudel did and said in reference to the submission, or supposed submission, to Mr. McGregor. But Mrs. Nudel's affidavit—which states that she never gave her consent to an arbitration, and that if any such consent was given by

her husband it was without her authority or knowledge—has not been contradicted; and Mr. *Fitzgerald* contended that the want of such consent or authority made the award clearly bad as respects her.

I may assume, from Mrs Nudel's uncontradicted affidavit, that she gave no express authority to leave the matters in question to arbitration. But it is clear that express authority is not always necessary to enable an agent to agree to a reference, (*Goodson v. Brooke*, 4 Camp. 163; *Henley v. Soper*, 8 B. & C. 16; *Curtis v. Barclay*, 5 B. & C. 141;) and if a wife has power to bind herself by a parol submission in relation to her separate estate, (a point which was not disputed on the argument,) I think her duly authorized agent may bind her, and that her husband may be her agent for that purpose. Nudel and his wife deny that the former consented to an arbitration; but whatever he really did, I think it a fair inference from the affidavits of both, that he had his wife's general authority for doing; and that he was, in good faith, with her knowledge and consent, and on her behalf, endeavoring to procure a settlement of the affairs of the estate. This being so, I am not prepared to say that the general authority which he had, did not enable him to refer the settlement of the accounts to an arbitrator, though nothing may have been said between him and his wife as to an arbitration. Giving full credit to her uncontradicted statement, I am therefore unable to declare the award to be so clearly invalid, that I may disregard it for the purposes of the present application.

Besides, it is not the executor alone who is interested in maintaining the award. It is part of Mrs. Nudel's complaint that some of the other legatees have not been charged by Mr. McGregor with their due proportion of some of the items, and I do not see how it is possible, in a proceeding to which they are not parties, to pronounce invalid an award in which they are interested.

On the whole, I think the case not one in which a decree can be obtained without a bill, and that the motion must be refused with costs.

## McMASTER v. KEMPSHALL.

*Dispensing with payment of purchase money—Vesting order.*

A motion to dispense with payment of purchase money (and for a vesting order) in favor of a purchaser under a decree, who is also one of the plaintiffs, requires notice to be served on the mortgagor where he has appeared by solicitor.

This was an *ex parte* application, on behalf of the purchaser of mortgaged property sold under decree, for an order dispensing with payment of the purchase money into court, and for a vesting order. It appeared that the purchase money of the whole property sold was insufficient to pay the claims of the plaintiffs, the mortgagees, who were the first incumbrancers, and who consented to the order going.

**MOWAT, V. C.**—The plaintiffs are first mortgagees; the defendants are the mortgagors and subsequent incumbrancers; the property was sold under the decree, and one of the plaintiffs became the purchaser at a sum less than the mortgage debt, and now moves *ex parte* for a vesting order, and that the payment into court of the purchase money may be dispensed with, the solicitor who moves consenting on behalf of the other plaintiffs. The defendants have appeared in the cause by their solicitors, and I am of opinion they should be served with notice of the application as to the purchase money. As to the vesting order, vide *Re William's Estate* 5 DeG. & S. 515.

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## BOULTON v. THE DON AND DANFORTH ROAD COMPANY.

Where there were several plaintiffs in a suit and a final order of foreclosure had been obtained by their solicitor, *Held* that their solicitor could not afterwards move on behalf of the defendants foreclosed, to set aside the order for foreclosure, though two of the plaintiffs concurred in the application and only the third objected.

This was an application, on notice, by *Snelling* on behalf of the Don and Danforth Road Company, to set aside, for

irregularity, the final order made herein foreclosing the company. The notice of motion was signed by Brough and Snelling.

*G. D. Boulton* contra for the plaintiff Boulton ; Mr. Brough was the solicitor for the plaintiffs in the suit, and as such obtained the final order which he now seeks to set aside, he is still the solicitor for two of the plaintiffs, and cannot act adversely to his former clients, especially as there has been no order to change solicitors. A person interested, named Slemin, has been served, who is not a party to the suit ; the proceeding by motion is therefore not proper. The application should be by petition to the court and not a motion in Chambers, *Hilliard v. Campbell*, 7 Grant 96.

*J. C. Hamilton* for Slemin, objected that he had been in possession of the property and made many improvements, and contended that under such circumstances the court would not open a foreclosure for mere irregularity.

*Snelling* in reply, alleged that the final order was obtained by some of the defendants for whom Mr. Brough was not acting, and contended that the same solicitor may appear for two parties (*Jones v. Creswicke*, 9 Sim. 304;) that the persons not parties could be made so in the master's office (*Dickey v. Heron* before the full court ; *McPherson v. Dougan*, 9 Gr. 259;) and that the application was properly by motion in Chambers, and not by petition to the court (*Thornhill v. Manning*, 1 Sim. N. S. 451.)

The following authorities were also cited and commented upon: *Gore v. Stacpoole*, 1 Dow. 18, 23 ; *Fisher on Mortgages*, 612 ; *Jones v. Roberts*, 12 Sim. 189 ; *McClel. and Y.* 567 ; *Griffiths v. Griffiths*, 2 Hare, 587 ; *Tooke v. Ely*, and *Lant v. Crispe*, 5 Bro. P. C. 181, 200.

**MOWAT, V. C.**—The defendants, Stainforth and Cotten, held a mortgage on the property of the Don and Danforth Plank Road Company, and the plaintiffs were sureties for the mortgage debt. The bill was to compel the company to pay the debt. They did not pay it, and, by reason of their default, a final order of foreclosure against the company was granted. Messrs. Brough and Robinson were the plaintiffs'

solicitors ; and I have satisfied myself, by an examination of the papers to which I was referred, that it was by them, as such solicitors, acting in conjunction with J. L. Robinson, Esq., the duly authorized agent of the mortgagees, that the order was obtained.

The firm of Brough & Robinson was afterwards dissolved, and Mr. Brough is now partner in the firm of Brough & Snelling, by whom a notice of motion has been served on behalf of the Company, for setting aside the order for irregularity. It seems that in consequence of some transactions subsequent to the obtaining of the order, the interest of the other two plaintiffs has become adverse to that of the plaintiff Boulton, and the present motion is made by Mr. Snelling with the concurrence of these two plaintiffs. Mr. Boulton opposes the motion, and objects that no order for changing the plaintiff's solicitors had been made ; and that Mr. Brough's former firm being the solicitors for the plaintiffs in the cause, his present firm cannot act for the defendants, the Company, especially on an application to set aside an order obtained by the former firm. I think this view is correct. I think Mr. Brough must be regarded by me as still solicitor for all the plaintiffs. He would, so far as I perceive, have been a proper person to have been served as such solicitor with the notice of this motion, if the Company had employed another solicitor to give the notice ; and the rule is clear that a solicitor cannot, by his own act, put an end to his relation with his client and act for the adverse party in the same suit, (Cholmondeley v. Clinton, 19 Ves. 261 ; Beer v. Ward, Jacob, 77.) It seems also that if he is himself disqualified, his partner is disqualified too. (Davies v. Clough, 8 Sim. 268.) If he could not act against all the plaintiffs, I think it follows that he cannot act against any or either of them, and that the concurrence of two of them in his acting for the opposite party does not deprive the third of his right to object to the change in his position.

It is certainly not pretended that Mr. Brough is in possession of any confidential information which he had received as solicitor for Mr. Boulton, and I am quite sure that he is

not. Indeed it does not appear that he individually had any knowledge of the proceedings that were taken by his former firm, or that he has had any thing to do with those taken by his present firm. Most of the cases turn upon the solicitor's knowledge confidentially acquired while acting for former clients; and in such cases the rule is, that when a solicitor has such knowledge, or were there is reason to apprehend that he has, and the communication of it might be prejudicial to the client, he is not at liberty to act for an adverse party, even in another suit, if it relate to matters in which the knowledge he has acquired would be available; and for this purpose it makes no difference whether his professional relation to his former clients had been put an end to by the client, (Johnson v. Marriott, 2 C. & M. 183; Bricheno v. Thorp, Jac. 300; Robinson v. Mullett, 4 Pri. 353,) or by the solicitor himself, (Davies v. Clough, 8 Sim. 262.) But the rule is more stringent in reference to a solicitor's acting for the adverse party in the same suit, (Cholmondeley v. Clinton.)

The application must be refused with costs.

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#### HURD v. SEYMOUR.

*Final order for sale,—Bank certificate.*

Mortgage money had been ordered to be paid on the 19th December; default being made, the usual bank certificate was obtained on the 20th December, and on the 10th February following, an application was made for a final order for sale, *Held*, that the bank certificate of the 20th December, being the only one produced, was too old for the court to act upon.

This was an application made on the 10th February, 1865, for a final order for the sale of mortgaged property. The day appointed for payment was the 19th December 1864, and the only bank certificate of non-payment produced was dated the 20th December 1864.

VANKOUGHNET C.—You must get another certificate. The court will hardly act upon one so old, as the party may have paid the money into the bank since.

## RANN v. LAWLESS.

*Next friend of married woman plaintiff—Solvency of.*

Where one of several co-plaintiffs is a married woman she must sue by *next friend*, who must be a solvent person, capable of answering costs.

This was an application to remove the next friend of a married woman, one of several plaintiffs, on the ground of insolvency, and to stay proceedings till the appointment of a new next friend, or that the present next friend should give security for costs. It was argued that the fact of the married woman being one of several plaintiffs did not alter the general rule requiring her next friend to be a solvent person, for where several persons were plaintiffs the bill could not be amended by striking out one of them without giving security for costs, shewing that all the plaintiffs were to be held liable for the costs. *Platel v. Craddock*, 1 C. P. Cooper, 469; *Richards v. Millett*, 9 Jur. N. S. 1066; *Davis v. Prout*, 7 Beav. 288; and *Snelling and Jones' Orders*, p. 315; were cited. Affidavits were read shewing the insolvency of the present next friend.

*McGregor*, contra, contended that the general rule did not apply where there were other plaintiffs besides the married woman; that security could not be required where one plaintiff was *sui juris*, as he would sufficiently answer for the costs. He cited *Hind v. Whitmore* 25 L. J. Ch. 394; *Stevens v. Williams*, 1 Sim. N. S. 545.

In reply it was urged that there would be no use having a next friend at all in such cases, unless it were for the purpose of answering costs.

**VANKOUGHNET C.**—I think the plaintiff must answer the defendant's affidavits; the next friend of a married woman must be a man of substance responsible for the costs, and the fact of other plaintiffs *sui juris* being joined, seems to make no difference. Let sufficient securities be given within a month, see order in *Stevens v. Williams*.

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NOTE.—See also on this point the recent case of *Smith v. Etches*, 1 H. & M. 711.

## BRIGHAM V. SMITH.

*Objections to bond for security—Number of sureties.*

Where a bond for security for costs, or for the due prosecution of an appeal is filed in an outer county, all objections to it or to the solvency of the sureties should be decided by the master of the county in which it is filed. A party giving a bond for security need not provide more than one surety therein.

This was an application by *S. H. Blake* to stay execution for the costs of the suit, pending an appeal to the Court of Error and Appeal. It appeared that two bonds with two sureties in each, had been filed in an outer county, where the pleadings had been filed, one, to secure the due prosecution of the appeal, and the other, to secure the payment of the costs, execution for which was now asked to be stayed. Con. Stat. U. C. page 64, sec. 16; was cited.

*Fitzgerald*, contra, was about to read an affidavit shewing the insolvency of one of the sureties, when

*VANKOUGHNET*, C., said, that though there was no established practice to that effect, yet that where bonds for security for costs, or the due prosecution of an appeal were properly filed in an outer county, it was desirable that all objections to them or to the solvency of the sureties should be decided by the master with whom they were filed, but as there was no settled practice on the point, his Lordship allowed the affidavit to be read, which was done accordingly.

*S. H. Blake* in reply. The affidavit only applies to one of the sureties, the other surety must be presumed solvent, and though it is the practice to have two sureties, yet it is well settled that one is sufficient.

*VANKOUGHNET* C.—Held that one surety was sufficient, and granted the application as asked.

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Note,—It is presumed that the above expression of his Lordship's opinion as to objections to a bond filed in an outer county, will establish a practice on this point.

## GARRATT v. McDONALD.

*Foreclosure—Sale.*

Where the decree is for sale of mortgaged premises, the court will not on default grant an order of foreclosure, *ex parte*.

This was a suit by a mortgagee, and the decree was for the sale of the mortgaged premises. The defendant had made default in paying the mortgage money at the time appointed by the master, and

*S. H. Blake*, for the plaintiff, now applied, *ex parte*, for a final order for foreclosure instead of one for sale; but

MOWAT V. C., refused the application.

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**BOULTON V. THE DON AND DANFORTH ROAD COMPANY.**

*Foreclosure, setting aside final order for.*

Where mortgagors had been foreclosed, and the mortgagees had subsequently sold the property, it was held that the mortgagors could not several years afterwards move in the suit against the final order of foreclosure, on the ground of irregularity, without having made the purchasers or their assignees parties to the suit.\*

A final order was made several years ago for the foreclosure of the company's interest in their road. One of the plaintiffs Boulton, afterwards bought the road from the mortgagees; and sold it to one Slemin, who was not a party to the suit. Slemin expended a considerable sum in repairing the road and sold it to a new company which was formed for the purpose of purchasing the road.

*Moss*, for the defendants, the Company, moved to set aside the final order of foreclosure. Notice of the motion had been served on all parties to the suit, and on Slemin, but not on the new company.

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\* See a similar motion in this cause, *ante* page 329.

*G. D. Boulton* contra, took a preliminary objection that after the lapse of time and the subsequent transactions which had taken place, the final order could not be impeached, if at all, by this mode of proceeding, or without first making the purchasers and their assignees parties to the suit.

MOWAT, V. C., allowing the objection, dismissed the application with costs.

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#### GEDDES V. ALLAN.

*Revivor.*

Where a sole plaintiff in a foreclosure suit dies after decree, his devisee is entitled, on *præcipe*, to the common order to revive.

This was a foreclosure suit; and after a decree and report had been made, the plaintiff died, having devised the mortgaged premises. The devisees and executors thereupon desired to revive the suit; but it being considered doubtful on the English authorities what was the proper course for this purpose, the case was spoken to before the judge in Chambers by *Snelling* on behalf of the devisees and executors. He referred to *Laurie v. Crush*, 9 Jur. N. S. 453.

MOWAT V. C.—The provision of the English act, 15 and 16 Victoria, ch. 86, sec. 52, which corresponds with the 3rd section of the 95th of Taylor's Orders (6th June, 1862,) has been held by some of the judges in England not to apply to the case of the death of a sole plaintiff in a case like the present. But as the 2nd section of our order has abolished bills of revivor, and other bills not original, which has not been done in England, the 3rd section must receive a more liberal construction than might otherwise be necessary. I think the common order to revive will be proper.

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NOTE.—The words “on the part of any plaintiff or defendant by *devise*, *bequest*, *descent*, or otherwise,” in the Order of the 6th of June, 1862, are not in the English act, and would seem to provide for such a case as the present.

## MUNN V. GLASS.

*Extension of time for service of bill.*

The court will not grant an order extending the time for the service of a bill. The solicitor must use due diligence to effect the service; and after it is effected must come to the court to get it allowed, if more than the time given by the Orders of the 6th of February, 1865, has elapsed.

This was an application by *Stephens* for an order to extend the time for the service of the bill.

**VANKOUGHNET, C.**—The court will not anticipate any difficulties in the service of a bill. If the bill cannot be served within the time limited by the new Orders, the solicitor must serve it as soon as he can, and run the risk of getting the service allowed afterwards. That was the intention of the court in making the Order.

Order refused.

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## SIMPSON V. THE OTTAWA AND PRESCOTT RAILWAY CO.

*Motion to remove receiver on the ground of misconduct—Duty of receiver.*

A receiver had been appointed to collect the gross amount of the tolls, rents, issues and profits, of the O. & P. Railway Co. Afterwards the rolling stock of the company had been seized by a sheriff under *fit. fa.* at the suit of another company not a party to the suit, the sheriff however declined to sell the same unless authorized by the receiver, who, believing under the advice of counsel that he had no control over the stock, assented to the sale by the sheriff, and the same was accordingly sold. *Held*, on motion to remove the receiver for misconduct, that he had committed a breach of duty in not informing the court of the seizure and threatened sale, and in assenting to the sale without its sanction; but as it appeared that the receiver had acted *bonâ fide*, and to the best of his judgment for the benefit of all parties, the court declined to remove him from his office, but ordered him to pay the costs of the application.

This was an application on behalf of the municipality of Prescott, for an order to remove the Receiver appointed in the cause, under the circumstances which are fully set out in the judgment.

*Crooks Q. C.* for the applicants, contended that, the rolling stock being necessary to the creation of revenue and tolls,

the mortgage of the revenue and tolls to the plaintiff and the municipalities covered such rolling stock; that the Receiver was guilty of neglect and misconduct in allowing the rolling stock to be seized and sold without applying to the court, and also that he had placed himself in a false position, and in one inconsistent with his duty as Receiver by becoming an officer of the Ottawa and Prescott Railroad Company, and that on these grounds he should be removed from his office. He cited *Wardle v. Lloyd*, 2 Moll. 388; *Russell v. East Anglian Railroad Company*, 3 McN. & G. 104; *Holroyd v. Marshall* 9 Jur. N. S. 213.

*Read* Q. C., contra, for the Receiver, contended that the mortgage did not cover the rolling stock, that the Receiver had no control over such stock, he being merely appointed to receive the rents &c., and that having acted *bona fide*, and to the best of his judgment, the sale by the sheriff being inevitable, the motion should be dismissed with costs. He cited *Reeve v. Whitmore*, *Martin v. Whitmore*, 12 W. R. 113; *Redfield on Railways* page 5. 9.

*Blake* Q. C., contra for the plaintiffs, contended that the Receiver had acted properly, as it would have been a useless expense to have applied to the court, which could not have interfered with the execution.

*Richards* Q. C., contra for the City of Ottawa.

*Howard*, contra for the Ottawa and Prescott Railway Co.

*A. Crooks* Q. C. in reply argued that the action of the other parties to the suit did not bind the municipality of Prescott, as the latter had an independent interest in the suit, and the stoppage of the road would cause them great damage, and the Receiver being appointed for the benefit of all parties could not act adversely to the interest of any of them.

**VANKOUGHNET, C.**—On the 24th of April, 1862, a decree was made in this cause by which, after finding the amount due to The Ebbwvale Company, the principal creditors of the Railway Company, and directing the manner in which payment thereof was to be made

by the Railway Company, it was provided that an auditor should be named by the Ebbwvale Company, who should have access to and authority to examine the books and accounts of the Railway Company, and in case the Railway Company made default in the payment ordered by the decree, the Ebbwvale Company was to be at liberty to apply for and nominate a person as Receiver, whose powers as such were to be defined by the court. The Railway Company having made default, the Court, upon the application of the plaintiffs and after hearing all parties, among whom was the Corporation of the town of Prescott, creditors of the Railway Company, on the 1st of May, 1863, appointed Thomas Reynolds to be Receiver in the cause under the provisions of the decree, and ordered that the Railway Company should thereafter pay into the hands of the said Receiver weekly, the gross amount of the tolls, rents, issues and profits of the railway, the same to be applied from time to time by the Receiver, in the first place, in payment of all proper expenses incidental to the maintenance and necessary for the proper conduct of the business of the road, such payments only to be made upon the order and requisition of the Company, and any balances which remained after such payment, and after deducting what might be allowed to the Receiver for salary, were to be paid into court monthly or oftener if required by the court, and that the Receiver was to pass his accounts yearly or oftener if required by the court, and that the appointment of such Receiver was not to interfere with the business of the Railway Company being conducted and managed by the Company, their officers, servants, and agents, under the powers conferred upon them by their act of incorporation and acts in amendment thereof, except so far as the same was expressly varied by that order, and that the receiver was at all reasonable times to have access to, and inspect all the books of account and papers, &c., appertaining to the business of the Railway Company.

The effect of the decree and order just quoted was, I think, to subjugate the property of the Railway Company to the control of the Court, which provided for its custody,

use, and management, through and by the officers of the Railway Company, and of the Receiver. The Court felt that the Receiver could not exercise all the franchise and powers of the Company necessary to be used from time to time for regulating the affairs of the Company and managing its business, and the working of the railway: and the Railway Company, undertaking, impliedly at all events, (for they were a consenting party to the decree, and did not repudiate the carrying on of the business of the road, but submitted to the order appointing the Receiver) to work the road and pay over the gross earnings to the Receiver, the latter undertook to receive them, and to apply them in the manner provided for by the order, and to enable him to see that he did receive all that was earned, he was empowered to inspect all accounts, &c., relating to the business of the company; and this it became his duty to do from time to time. Such being the position of matters, the Grand Trunk Railway Company of Canada having purchased certain judgments recovered against the Railway Company, caused the sheriff of Carleton to seize the rolling stock of the Company (with which the road was worked) under writs of execution issued upon those judgments. So soon as the solicitors for the corporation of Prescott became aware of this act, they notified Mr. Reynolds of it and called upon him as the officer of the court to interfere and prevent the threatened sale of the property. To this letter the Receiver replied by stating that he had communicated with Mr. Read, the solicitor for the plaintiffs, on the subject, and had already protested against the action of the Grand Trunk Railway Company in the matter. Mr. Read subsequently, and on the 15th of October, 1864, writes to the solicitor for Prescott that, so soon as he had been apprised by the Receiver of the seizure of the rolling stock, he had telegraphed him to come to Toronto to make the necessary affidavits in order to take the necessary proceedings to protect the interests of the plaintiffs, and that when he arrived he would also advise him that it was his duty to bring under the notice of the Court the proceedings which he, Mr. Read, understood had lately been taken by some parties resulting in the stoppage

of the trains on the Railway. On the 11th of October, 1864, the Receiver telegraphed to the sheriff of Carleton in these words, "As Receiver appointed to the Ottawa and Prescott Railway Company under decree of the Court of Chancery, I claim to be in possession of the rolling stock and property seized by you, and protest against the seizure and sale thereof, holding you responsible for all damages." The sheriff received this message. On the 20th October, at the foot of the copy of this message, as received by the sheriff, the Receiver made the following memorandum, which the sheriff received, viz.: "I hereby withdraw the within telegraph, as I am advised that the first mortgage, the holders of which I represent, have no legal claim on the stock referred to, as the decree in Chancery, as I am informed, does not cover it. I withdraw the claim I made in the said telegraph." The deputy-sheriff for Carleton swears that under the writs of execution mentioned, he in the month of October seized the rolling stock of the Railway Company; that after, and in consequence of the receipt by telegraph of the Receiver's protest against the seizure, he refused to proceed with the sale of the stock; that afterwards in his presence the Receiver withdrew his said notice and consented to the said sale of said stock, and expressed such consent by the memorandum written on the telegraph message and already quoted; that in consequence of such consent he, the deputy-sheriff, proceeded with the sale of the rolling stock, which, on or about the 20th of October was sold to Mr. Brydges. Mr. Brydges is the managing director of the Grand Trunk Railway Company. It is asserted that this seizure and sale of the rolling stock caused the stoppage of business on the road and the running of trains. The Receiver in answer to this says, that the road was in such a bad state that it was unsafe at the time to run trains for the conveyance of passengers or goods. That this rolling stock so sold was necessary to the working of the road, and that without it the road could not be worked at all, at least till other was procured, seems to be admitted by all parties. Under these circumstances a motion is made to remove Mr. Reynolds from his office of Receiver for dereliction or breach

of duty in not having applied to the court to have the sale of the rolling stock prevented.

Mr. Reynolds, in defence, swears that he was advised by competent counsel that the mortgage bonds and the first mortgage did not cover the rolling stock, and that he had no right to interfere with it, and that, acting under such advice, he wrote upon the telegraphic message to the sheriff the memorandum already mentioned, believing that in so doing he was acting properly, and that were he to do otherwise, he would be involving himself in expensive litigation. He also, swears that he was informed by counsel that the Court of Common Pleas, at Toronto, had determined that the title of the Grand Trunk Railway Company, as the assignees of the Commercial Bank, who were mortgagees of the said stock, was valid. He denies collusion with any one, and claims to have acted for the best interests of all parties. He further swears that he was and is advised by counsel that the mortgages in question in this suit do not cover the said rolling stock, and that the decree gives him no power over it, and also, that he had not under it the control of the working of the line, but only of the receipts and expenditure. Mr. Reynolds does not swear that he was advised that it was no part of his duty to bring under the notice of the court the seizure and threatened sale of the rolling stock; he may have meant this to be implied from what he has stated; but on the other hand, we have the letter of Mr Read, his solicitor and counsel, stating that he would advise him that such was his duty. Mr. Read was acting as solicitor for the plaintiffs when the decree in the cause, and the order appointing Mr. Reynolds Receiver was made, and no one, therefore, knew better than he did the position in which the property stood, or in which Mr. Reynolds stood in relation to it. He does not state that he did not give Mr. Reynolds the promised advice, nor does Mr. Reynolds deny that he received it. I think it was the duty of Mr. Reynolds to have brought under the notice of the Court the interference by third parties with the property which was being administered by the Court, and in regard to which Mr. Reynolds, as the officer of the Court, held a

position of high trust and importance. It was not for him to decide who had the prior claim upon the property; this the Court would do on a proper application for the purpose. Would it be right in the Receiver of the rents and profits of this road, admitting that his duty was confined to this merely, to stand by and see all the property of the road by which those rents and profits were created, (rents and profits which were to come into court for distribution—which in fact were being received by the court through him,) swept away by any one who might lay claim to it, and not in any way interfere, because he was not in possession of the corpus of the road? He must, I think, sadly mistake his duty, if he thinks he could adopt this passive course. Now what was done here? The rolling stock necessary to the working of this road is seized by the sheriff at the suit of third parties; without this rolling stock the rents and profits which the court had directed its officers to get in could not be created. The stock is sold; the road is stopped, and then by arrangement between the purchaser of the stock, Mr. Brydges, (who, as I understand, purchased on behalf of the Grand Trunk Railway Company,) and all parties interested in the Railway Company, except the town of Prescott, the road is set in motion again. Where is the Receiver all this time, and what is to become of the rents and profits now, or has the Receiver ventured to make any arrangement in regard to them? The town of Prescott refuses, as it has a right to do, though its interest may be small, an assent to this new arrangement, and claims that the Receiver was appointed to act for all the parties to the suit, and not for one or more merely. In this the town is right. Mr. Reynolds, being the attorney and agent of the plaintiffs, has, I apprehend, forgotten at times that his position as such is subordinate to that of Receiver for the Court, and that without the sanction of the Court he cannot consent to any change in the position of the property. If he finds the one duty inconsistent with the other, he can readily rid himself of either. Mr. Reynolds swears that in all he has done he has acted to the best of his judgment for the interests of all parties. I do not doubt this, but he must remember that in

all he does or omits to do he is responsible to this Court, as its officer. Still, believing Mr. Reynolds' statements as to his good faith, and his having acted under the advice of counsel, I will not remove him from his office of Receiver for the act which is alone made the subject of complaint against him now, namely, the permitting the sheriff's sale to proceed without applying to the court in relation to it; but as I think he was in the wrong, I must order him to pay the costs of this motion, which is the only order I make. It might not be for the advantage of the parties to remove Mr. Reynolds upon any of the other grounds which the papers filed suggest.

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#### BARRETT V. GARDNER.

##### *Amendment of bill after decree.*

The court will not grant an order to amend a bill after a decree has been made in the cause.

This was an application for leave to amend the bill by substituting the words "second concession" for the words "twelfth concession," in the description of the land contained in the bill. It appeared that a decree had been made in the cause.

VANKOUGHNET, C.—I know of no practice by which you can amend a bill after a decree has been made in the cause, and I cannot establish one. If it is necessary to amend the bill, your only course, I think, will be to vacate the decree.

Order refused.

## RE BLAIN, A SOLICITOR.

*Examination of client as to debts, &c.—Taxation of costs.*

A solicitor, whose costs have been taxed on the application of the client, and not paid, a *fi. fa.* having been returned *nulla bona*, is entitled to an order for an examination of the client, touching his estate and effects.

This was an application by *Blain*, on notice which had been personally served on the client, for an order to examine the client as to his estate and effects, and the debts due to him. The application had been made previously to his Lordship the Chancellor, who doubted whether such an order could be granted in respect of costs, and it stood over for the production of authorities. The application was now renewed, and 27 & 28 Victoria, chapter 25, was cited to shew that the reason for the doubt expressed by his Lordship had been removed. The facts appear in the judgment.

MOWAT, V. C.—An order was obtained by Jesse Ketchum for the taxation of Mr. *Blain*'s bill of costs against him as his solicitor, and the order contained the usual direction that the client should pay the amount that might be found by the Master to be due. In pursuance of this reference, the Master reported £36 2s. 9d. to be due to Mr. *Blain* by Mr. Ketchum. A *fi. fa.* against goods for the amount has been returned *nulla bona*, and Mr. *Blain* now moves on notice that Ketchum should be examined touching his estate and effects, under 22 Vic., ch. 24, sec. 41. He referred also to the 3rd, 15th and 19th sections of that act, and to 27 & 28 Vic., ch. 25, and argued that *Hawkins v. Patterson*, (23 U. C. Q. B. 197,) did not affect the present case.

I think the order should go.

## CLARKE V. HAWKE.

*Examination of plaintiff by defendant.*

The defendant is entitled to examine the plaintiff before a special examiner under Order XXII. of the 3rd of June, 1853, notwithstanding that the cause has been set down, and notice of examination and hearing served.

This was an *ex parte* application of *S. H. Blake*, on behalf of the defendants, for an order for the plaintiff to appear before Mr. Hector, special examiner, at her own expense, and submit to be examined. It appeared that the cause had been set down for examination and hearing, and notice thereof served by the plaintiff, and that an appointment for her examination had been duly taken out and served, together with a subpoena; and a certificate of Mr. Hector was read, shewing that the plaintiff had attended, but had by her counsel refused to be examined, on the ground that the defendant had no right to examine her after the cause had been set down, and notice thereof served, and that Mr. Hector had overruled the objection, and that notwithstanding, the plaintiff had declined to submit to be examined. It was contended that the objection was groundless, for otherwise a plaintiff might file his replication, and set down the cause immediately after answer, and so deprive the defendant of any opportunity to examine him. Counsel also stated that as to the case of *Barton v. Lewis*, mentioned at page 99 of Taylor's Orders, which seemed to be the authority relied on to support the objection, he had been in Chambers when that was decided, and the reason for that decision, although it did not appear in Taylor's Orders, was, that publication had passed.

MOWAT, V. C.—I think under the circumstances you are entitled to the order asked. If the other side object to it, they can move against it.

Order granted.

## ANDREWS v. HEMPSTREET.

*Investment of money in court—Form of security.*

As a general rule, loans of money in court cannot be made on property on which there is any prior charge, however small, unless all parties interested consent.

This was an application by *Fitzgerald*, on behalf of the plaintiff, for an order allowing the investment of \$1,230, money in court, on a mortgage of real estate to be given by the proposed borrower, one John McCort. The facts of the case, and the objections raised by the defendants, are fully stated in the judgment.

**MOWAT, V. C.**—In this case there is in court a sum of \$1,230, on which the plaintiff is entitled to the interest for her life, and at her death the principal goes to the defendants. The plaintiff proposes a loan of the money to Andrew McCort, on a mortgage of a farm devised to Andrew by his father, John McCort. The defendants suggest several objections to the title.

1. It is said that there may be debts of the testator still outstanding, which is unlikely, as the testator died nearly twenty years ago. But his will contains no charge of debts; and it is clear in such a case, from the authorities collected in *Sugden on Vendors*, pages 655 and 661, 14th ed., and *Dart on Vendors*, 3rd ed., page 403, that if there should hereafter turn out to be any debts still outstanding, a purchaser would not be subject to them. A mortgagee is a purchaser *pro tanto*.

2. It is objected that Andrew's estate, by his father's will, is subject to an annuity in favor of the testator's widow, or to her dower, in lieu of which the annuity was given. In reply to this objection, it is said that the annuity has been accepted by and paid to the widow for the last ten years, and that it is a small amount, as compared with the value of the property. The amount is certainly small, but I am of opinion that, as a general rule, this court cannot lend money on property on which there is any prior charge

whatever, except with the consent of all parties interested. A proper deed, postponing to the mortgage the widow's claim, whether to the annuity or to dower, will therefore be necessary before the loan can be sanctioned.

3. The last objection is, that Andrew's estate is also subject to a legacy of £50 to one of his brothers, the same being charged on the land in question, and other land devised to the testator's son John. It was contended, on behalf of the plaintiff, that only one-half of this sum was charged on Andrew's lot, but I think both lots are charged with the whole sum, though if the owner of one pays the whole, he is entitled to contribution from the other. I think the defendants ought not to be put to the hazard of having by and bye to pay the \$200 in the first instance out of their own pockets, though they might be entitled to get back part of the amount from the owner of the other lot. It is said that part of this legacy has been paid to the legatee, namely, \$69, but as he was a minor at the time, and is so still, the payment was not valid. (See Williams on Executors, 1267, 5th edition; Imperial Statutes, 36 Geo. III., ch. 52, sec. 32; 37 Geo. III., ch. 135.) I think, therefore, that the loan to McCort can only be sanctioned to the extent of \$1030, retaining the remaining \$200 in court as a security against the legacy.

In anticipation of the loan a mortgage has been executed by McCort, in favor of the registrar, but without any statement of the trust on which he is to hold it. This is not correct, and if the loan is proceeded with, it will be necessary to supply the defect, either by a new mortgage, or a declaration of trust.

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**IN RE THE SECOND CONGREGATIONAL CHURCH PROPERTY,  
TORONTO.**

*Sale of property of religious institutions.*

To effect a sale by trustees under the act respecting the property of Religious Institutions in Upper Canada, it is essential that all the requirements of the statute should be complied with, and, therefore, that the public notice should state the terms of the intended sale.

This was an application for the sanction of the court to the proposed sale of property of the Second Congregational Church of Toronto. The facts fully appear in the judgment.

MOWAT, V. C.—The trustees have disposed of this property and now apply for the sanction of the court to the execution of the deed. The application is made under the Consolidated Statute U. C., ch. 69. By the 8th section of this act it is provided that the trustees, in such case, may give public notice, specifying the premises to be sold, the time and terms of sale, and, after publication of the notice for four successive weeks, may sell the property at public auction, according to the notice. Should the property not then be disposed of, the ninth section enacts that the trustees may thereafter sell the land by either public or private sale. This section only applies where the requirements of the eighth section have been complied with. In the present case one of these requirements has been disregarded: the public notice did not specify the terms on which it was intended to sell the property. I have no authority to dispense with this provision, and have therefore no authority to sanction the execution of the deed, which has been submitted to me. The trusts of the deed to the trustees are such as, it would seem, may enable the parties to carry into effect the sale out of court, and independently of the statute.

Application refused.

## HARE v. SMART.

*Order pro confesso after six months from service of bill—Absconding defendant.*

Where, on a motion for an order *pro confesso* after six months from the service of the bill, it appears that the defendant has absconded, the order *pro confesso* will be granted *ex parte*.

This was an *ex parte* application by *Smart* for an order to take the bill *pro confesso* against one of the defendants. It appeared that more than six calendar months had elapsed since the service of the bill upon him; it was alleged however, that the defendant had absconded from the province since the service of the bill upon him, and there would be difficulty in serving him with the notice of motion.

**MOWAT, V. C.**—On an affidavit that the defendant had absconded, I think I may make the order. See Order XXXIV., sec. 5.

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**NOTE.**—The required affidavit was subsequently produced and the order *pro confesso* was thereupon granted.

## KING v. FREEMAN.

*Foreclosure suit—Interim injunction—Decree on præcipe.*

Where in a foreclosure suit an interim injunction had been granted to restrain the cutting of the timber, the Registrar has no power to grant a decree on *præcipe* containing a provision for continuing the injunction. For this purpose the cause must be brought on for hearing.

This was a foreclosure suit; the bill prayed for an injunction to restrain the defendant from cutting timber on the mortgaged premises, and an interim injunction had been moved for and obtained; the time for answering having elapsed and no answer or note having been filed, *Kerr* now asked for an order *pro confesso*, with a view of setting the cause down for hearing, contending that the Regis-

trar had no power to continue the injunction, and that a hearing before the court was therefore necessary.

VANKOUGHNET, C., held that it would be necessary to go to the court to obtain a decree continuing the injunction, and granted the order as asked.

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PENNER v. CANNIFF.

SIMPSON v. DUGGAN.

GRANT v. PATTERSON.

*Making persons interested in the equity of redemption parties in the Master's office.*

An order to make persons interested in the equity of redemption of mortgaged property parties to the suit in the Master's office, will not be granted *ex parte*; notice should be served on the owners of the equity of redemption already before the court, but not on those proposed to be added.

These were *ex parte* applications for orders to make persons interested in the equity of redemption of mortgaged property (the suits being for foreclosure) parties to the suit in the Master's office.

MOWAT, V. C., declined to grant such orders *ex parte*, and directed notice to be served on those owners of the equity of redemption who were already parties, service on those proposed to be added not being necessary.

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BERRIE v. MACKLIN.

*Dismissal of bill without costs—Disclaimer.*

Where a defendant, having an interest in the property in question in a foreclosure suit at the time of the filing of the bill, puts in a disclaimer, he will not be entitled to any costs.

This was an application by *F. T. Jones*, on behalf of Joseph Jeffrey, jr., one of the defendants, for an order to

dismiss the plaintiff's bill for want of prosecution. The suit was for foreclosure, the defendant moving, having been made a party as owner of a small portion of the mortgaged property, had filed what he called an answer, disclaiming his interest in the property in respect of which he had been made a party, but alleging that he had purchased a portion of the property comprised in the mortgage at a tax sale, and claiming that the property so purchased was exempt from the mortgage, and stating that he had conveyed this away to persons not parties, and that he had no interest at the time of his answer in any part of the property.

*S. Brough*, Q. C., contra, consented to the dismissal of the bill, but contended that under the circumstances it should be without costs, the so-called answer being merely a disclaimer, which was quite unnecessary, as the same object would have been attained if the defendant had done nothing at all. He cited *Ford v. The Earl of Chesterfield*, 16 Beav. 516, and *Talbot v. Kemshead*, 4 K. & J. 93, to shew that under circumstances such as the present the plaintiff was entitled to dismiss his bill without costs.

*F. T. Jones*, in reply, contended that if the defendant had filed no answer at all, the plaintiff would have had no right to dismiss his bill without costs, citing *Coote v. McBeth*, *ante* page 200, and that the filing of a disclaimer should put the defendant in no worse position.

*Mowat, V. C.*—I think the application should be granted without costs, on the authority of the cases cited. The answer does not deny that the plaintiff's properly made Jeffrey a party; he, however, does not wish to redeem, and therefore disclaims any interest under the conveyance in respect of which he was made a defendant. He states that at one time he had a paramount title to part of the property, in addition to his interest, as mentioned in the bill; but he proceeds to say that he has since conveyed to others, and he makes no claim to the property now.

Order granted without costs.

## HARVEY V. TAYLOR.

*Pro interesse suo—Claimant—Costs.*

Under a sequestration against the defendant, property on his land had been seized, to which a third party laid claim, and which the bailiff released to the claimant upon his own undertaking; upon inquiry by the plaintiff into the circumstances he released the property, but not until after notice given by the claimant of a motion in the nature of one for an examination *pro interesse suo*: *Held*, that the claimant, by leaving his property in the custody of the defendant, had brought the difficulty on himself, and was therefore not entitled to the costs of the application.

This was an application under Order XLI. of 3rd June, 1853. The claim of the applicant having been acceded to since notice served, the motion was now brought on merely on the question of costs. The facts fully appear in the head-note and judgment.

**VANKOUGHNET, C.**—This is an application in the nature of a motion for an examination *pro interesse suo* to procure a return to the claimant, one Harris, of certain chattel property seized under a writ of sequestration issued against the estate, real and personal, of the defendant. The property so seized and claimed was found by the sheriff's bailiff on the premises of the defendant, where it had been left by the claimant by permission of the defendant. Immediately after the seizure Harris made claim to the property, when the bailiff released it to him on his own undertaking to restore it if called for. The bailiff reported this claim to the plaintiff's solicitor, and he on inquiry, but after notice of this motion was given, ordered the bailiff to release the property to the claimant. The only object of bringing on this motion was to dispose of the costs incurred by it. I think no costs should be given. If the claimant had not left this property on the premises of the defendant to be mixed up with his, it would not have been seized. He brought the difficulty on himself. There was no harshness shewn to him in the matter. The bailiff left the property in his custody, and the plaintiff abandoned all right to hold it under the writ when he had learned the facts.

## CROOKS V. GLENN.

*Order for payment into court of deposit at sale—Conduct of sale.*

Where the party having the conduct of a sale, neglects to pay into court the deposit paid to him by the purchaser at the time of sale, the court will, on the application of the purchaser, order him to do so. *Sembler*, that a purchaser at a sale under decree has a right to take out the report on sale, and get it confirmed, so as to obtain a completion of the purchase to himself, at least where he is the sole purchaser.

There had been a sale under the decree in this cause, the plaintiff, who sued in person, having had the conduct of it. The purchaser had paid to the plaintiff at the time of the sale the deposit stipulated for in the conditions, (which were the usual ones in this respect,) but the plaintiff had neglected to pay it into court. The Master had made his report on the sale, but the plaintiff had also neglected to take it out and file it, so as to confirm the sale, and a motion was now made by *Howard*, on behalf of the purchaser, for an order against the plaintiff to pay the deposit into court, and to transfer the conduct of the sale to the purchaser, so as to enable him to get the sale confirmed. He cited Taylor's Orders, pages 119, 135, 141.

*Crickmore* appeared for the defendant, in support of the application.

*R. P. Crooks* contra.

*SPRAGGE, V. C.*—Let the order go for the payment of money into court, with costs to be fixed by the Registrar. As to the application to give the conduct of the sale to the purchaser, it can be done by the Master, if necessary, but I see nothing to prevent the purchaser taking a report of the sale to himself, (here he was purchaser of the whole property,) and proceeding to complete the purchase.

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## HIND V. LITTLE.

*Service of Notice—Toronto agents.*

D., a country solicitor, employed McN. and H., as his booked Chancery agents in Toronto, H. being the one who conducted the Chancery business of the firm; McN. and H. dissolved partnership, *Held*, that a notice served upon a clerk in the office of McN., after the dissolution, was not a good service upon D.

This was an application by *J. C. Hamilton*, on behalf of the defendant, for an order to dismiss the plaintiff's bill for want of prosecution. It appeared that McNab and Huggard, who appeared to be the booked Toronto agents in Chancery of Mr. Dunne, of Hamilton, the plaintiff's solicitor, had dissolved partnership; that Mr. Huggard, who conducted the Chancery business of the firm, had left Toronto: that Mr. Dunne had no other booked agents in Toronto; and that the notice of motion had been served upon a clerk in the office of Mr. McNab, the other member of the firm, who still carried on business by himself in Toronto.

*Dunne*, contra, objected that no sufficient service of the notice had been effected in him; that in reality the firm of McNab and Huggard being dissolved, he had no booked agent in Toronto, and that the proper course of the defendant would have been to have posted the notice up in the Registrar's office.

*SPRAGGE, V. C.*, held that the service was insufficient, and that a new notice must be given.

Order refused.

## IN RE MALCOLM C. CAMERON, A SOLICITOR, &amp;C.

*Taxation of costs at instance of client—Costs of County Court suit—Jurisdiction.*

On an application by a client for the taxation of his solicitor and attorney's costs in a suit in this court, and in another suit in a County Court, the affidavit of the client admitted a retainer in the County Court suit, but denied one in the suit in this court: the solicitor making no claim for costs in the suit in this court. *Held*, that this court had no jurisdiction to order a taxation of costs between the client and solicitor.

This was an application on behalf of one John Fisken, for an order to tax the costs of Mr. M. C. Cameron, his attorney and solicitor, in a suit in the County Court of Huron and Bruce, and in one in this court. The affidavit of Mr. Fisken, in support of the petition, denied any retainer by him in the suit in this court, but admitted the retainer in the County Court suit. The solicitor had not delivered any bill of costs in the suit in this court. The other facts appear in the judgment.

*F. T. Jones*, contra, contended that under the circumstances this court had no jurisdiction.

*SPRAGGE, V. C.*—I think this court has not jurisdiction in the matter. The applicant alleges in his petition, and swears in his affidavit, that he did not retain the solicitor in any proceeding in this court, and the solicitor makes no claim for proceedings in this court. He is suing at law for proceedings at law only. It does not appear that the solicitor has any fund in his possession to which the client is entitled, or any papers of the petitioner to which he claims a lien. It is a naked case of a suit at law to recover common law costs, and an allegation by the petitioner that the solicitor claims costs in Chancery, which the solicitor disclaims, and denies having ever claimed. There is, therefore, nothing to give this court any jurisdiction in the matter.

## EVANS v. ROOT.

*Order to amend without prejudice to an injunction.*

Where the time for amending the bill as of course has not elapsed, an order to amend, without prejudice to an injunction, is as of course, and obtainable on *præcipe*; it is unnecessary to apply in Chambers for it.

This was an *ex parte* application by *Hodgins* for an order to amend the plaintiff's bill, without prejudice to an existing injunction to stay the defendant from cutting timber. He cited *Snelling and Jones' Orders*, 311, and *Gamble v. Ellis*, in Chambers, (not reported,) to shew that such an order was necessary, so as to preserve the injunction on amending the bill.

SPRAGGE, V. C.—I incline to think the order is of course, and that this application is not necessary. *Smith Ch. Pr.*, ed. of 1837, vol. i., p. 627; *Pickering v. Hanson*, 2 *Sim.* 488. May take order but, *semble*, is entitled to costs only of order obtained on *præcipe*.

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## WHITMARSH v. FORD.

*Guardian ad litem to infant—Service of notice.*

Upon an application to appoint a guardian *ad litem* to an infant, who was a resident pupil at Upper Canada College, Toronto, it appeared that notice of the application had been served upon the principal of the college. *Held*, that this was service upon "a person with whom, or under whose care" the infant was residing within the meaning of Order XIII., sec. 5.

This was an application by *S. H. Blake*, on behalf of the plaintiff, for the appointment of a guardian *ad litem* to the infant defendants. The only question was as to one of the infants who was a resident pupil of Upper Canada College, Toronto, the notice of the application under sec. 5, of Order XIII., having been served upon Alexander Cockburn Esq., the principal, and not upon the master of

the boarding house of the college. Counsel contended that the service made was the proper one, or at least was sufficient. He cited *Christie v. Cameron*, 4 W. R. 589, mentioned at p. 76, Taylor's Orders.

**SPRAGGE, V. C.**, held, that though, perhaps, service on the master of the boarding house would have been more proper, yet that the service made was sufficient, and granted the order.

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#### SOMERVILLE v. JOYCE.

*Trustee—Substitutional service.*

Where several trustees of a religious society were defendants to a foreclosure suit, as owning the equity of redemption, and one of them had left the country, substitutional service for him, on one of the other trustees, was allowed.

This was a bill for foreclosure ; the defendants were trustees of a religious society, to which the property belonged, subject to the plaintiff's mortgage. One of the trustees had left the country, and enlisted in the army of the neighbouring Republic.

**MOWAT, V. C.**, allowed substitutional service on one of the other trustees, for such absent defendant.

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## MALE v. BOUCHIER.

*Application to commit.*

The court will not order a commitment for disobeying a decree, where the disobedience is in effect the nonpayment of money.

This was a motion on notice by *Spencer* on behalf of the plaintiff for an order to commit the defendants for disobeying decree. Service of notice was duly proved, but no one appeared to answer the application.

The facts fully appear in the judgment.

SPRAGGE, V. C.—The bill alleges in substance that the testator held a lease with right of purchase from King's College; that by his will he directed the purchase to be completed for the benefit of the plaintiff, and that sufficient funds for that purpose have come to the hands of the executor and executrix; that the lease and time for purchase have expired, but the Bursar is still willing to sell, *i.e.*, as I read the bill, that he waives the forfeiture if any; consequently those representing the testator have only to pay the money in order to get a conveyance. The decree directs the executor and executrix to complete the purchase within a month, and to convey to the plaintiff within another month. The decree has not been obeyed, and the plaintiff applies for an order to commit. The first thing to complete the purchase, and the substantial thing, as appears by the bill, is to pay the purchase money. I think if I were to order the defendants to be committed, it would be in reality for non-payment of money, and that I should contravene the statute. It is not suggested that the money has been paid, and that the disobedience to the order consists in something else. If that were shewn, I should give the order; that not being shewn, I should run the risk of committing for nonpayment of money, and that with my eyes open, for I have reason to infer that in that consists the real disobedience. If the plaintiff will shew that the money has been paid, I will give the order.

## WELDON V. TEMPLETON.

*Guardian ad litem—Change of reference.*

Where a guardian *ad litem* of infant defendants leaves the province, another will be appointed on the *ex parte* application of the plaintiff.

Where it becomes necessary in the course of a suit to add as a defendant the Master to whom the cause stands referred, a change of reference will be made on the *ex parte* application of the plaintiff.

In this case, which was a foreclosure suit, it appeared that T. W. Lawford, the solicitor and guardian *ad litem* for the infants, had left the province, and also that Mr. Shanly, the Master at London, to whom the cause had been referred, was a necessary party to the suit, and *S. H. Blake* now applied *ex parte*, for an order appointing a new guardian *ad litem*, and changing the reference to Toronto.

SPRAGGE, V. C., granted the order as asked.

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BLACK V. BLACK.

*Retainer by administrators of funds in their hands for payment of costs due them—Jurisdiction.*

A bill had been dismissed, with costs to be paid to the plaintiff. Two of the defendants were administrators, and as such had funds in their hands to which the plaintiff was entitled as one of the heirs and next of kin of the intestate. The defendants had been unable to obtain the costs by *fit. fa.*, and filed a petition asking to be allowed to retain the funds in the hands of the administrators. *Held*, that the court had no control over the funds, and the petition was dismissed with costs.

This was an application by petition, presented by the defendants under the circumstances stated in the head note and judgment.

*Sullivan*, for the application, handed in the following authorities *Mileham v. Eicke*, 3 M. & W. 407; *Allen v. Impett*, 8 *Taunt.* 263; *Hill on Trustees*, 568; *Case v. Roberts, Holt*, N. P. C. 500; *Edwards v. Bates*, 13 L. J. N. S. C. P. 156; *Wilson v. Switzer*, Ch. Cham. Rep. 75.

*Rae*, contra, contended that there was no authority for such an application, the court having no jurisdiction over the fund in question ; besides, the application was unnecessary, as the administrators could retain funds in their hands under such circumstances to pay debts due themselves.

SPRAGGE, V. C.—The plaintiff's bill stands dismissed out of court with costs ; the defendants are Charles Black, John Black, and several others ; Charles and John Black are administrators of the estate of John Black, and the plaintiff, as one of the next of kin of John Black, is entitled to a certain sum, which is in the hands of Charles and John Black as such administrators, and to a further sum as one of the heirs of John Black, being rents and profits of real estate which Charles and John Black have received. The defendants appear to be unable to obtain satisfaction of the above costs by writ of execution, and they ask for an order of this court allowing them to retain the amount out of the sums in the hands of Charles and James Black ; they are all heirs and next of kin of John Black. The first difficulty is, as to the right these defendants have to come to this court in the matter ; the funds in the hands of Charles and John Black are not under the control of this court ; yet the defendants ask that two of their number may be permitted to make a particular disposition of them ; and further, if they have a right to retain out of them the amount of these costs there is nothing to prevent them doing so. When called upon to account for them, such application of them would be a proper accounting, and they do not need the intervention of this court. I do not say that they have such right, and it would not be for me to give any opinion as to whether they have or not, unless the active interposition of the court becomes necessary. None of the cases to which Mr. *Sullivan* refers me meets this difficulty. I must therefore refuse his application with costs.

## ATTORNEY-GENERAL v. TAYLOR.

*Review of taxation—Costs in cause.*

The plaintiff had obtained a decree with costs against the defendant. Afterwards, by consent, a supplemental order varying the decree was made, which was silent as to costs. *Held*, that the costs of such order and proceedings thereunder were not costs in the cause, and could not be taxed against the defendant.

This was a petition by *Sullivan* on behalf of the defendant to review the taxation herein. It appeared that a decree had been made, with costs, ordering a patent obtained by the defendant to be delivered up to be cancelled, and that afterwards, by consent, a supplemental order (which was silent as to costs) had been made varying the decree by declaring the patent void unless the defendant executed a conveyance to the plaintiff. On the reference the Master had allowed to the plaintiff the costs of the proceedings under the order, including the conveyance. It was contended that these costs were not costs in the cause and should not have been allowed, and it was asked that they should be taxed off.

*Hodgins*, contra, contended that the order was a mere amplification of the decree for the benefit of both parties, more especially the defendant, and should be deemed to be a part of the decree.

SPRAGGE, V. C.—I think the plaintiff not entitled to any costs beyond the general costs in the cause taxed under the decree; the subsequent order is by consent, and is silent as to costs; what the plaintiff desires in effect is to add another term to the order. The subsequent order, and the proceedings under it, are not proceedings in pursuance of the decree. It is in fact a compromise of what was the subject matter of the suit, outside the decree, and beyond what it was competent to the court to decree; the costs of such proceedings cannot I think be costs in the cause. I think the Master was in error.

Application granted, no costs.

## COOPER V. LANE.

*Substitutional service*—28 Victoria, ch. 17.

The act 28 Victoria, ch. 17, gives the court larger powers as to proceeding against absent defendants whose residence is unknown, and the court will grant orders for substitutional service in cases where it would not under the practice before the act, dispensing with advertising where it would be useless.

The defendant could not be found, and an application was made for substitutional service of the bill upon his brother, who was resident in the province. The brother was not in possession of the premises in question, nor did it appear that he was in any way the agent of the defendant.

SPRAGGE, V. C.—I think the plaintiff entitled to an order. Under the recent statute the court may order proceedings to be taken against an absent defendant according to the practice of the court where the residence of the defendant is unknown, or in any other manner that may be provided or ordered. The latter words, particularly the word “ordered,” would seem to mean in any manner that may be directed in the particular case. I think an advertisement in this case would be useless, and direct service to be made on the premises, and that a copy of the bill be sent by mail, prepaid, to the address of the defendant’s brother. Time for answer to be eight weeks.

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## HARRISON V. PATTERSON.

*Substitution of one person for another as purchaser—Opening biddings.*

The court will in a proper case, and upon conditions, substitute a proposed purchaser at an increased price for a party who has purchased property at a sale under a decree of the court, instead of opening the biddings generally and directing a re-sale; giving the present purchaser the option to take at the increased price.

This was an application by *J. C. Hamilton*, on behalf of one *P. Curtin*, for an order to substitute him as purchaser of

one of the two lots sold to one Wallace under the decree in the cause. The original purchase money of this lot was £17, and the increased price proposed to be given £85.

*Osler*, contra, for the present purchaser, objected that there was no practice for such a motion, that it was in effect opening the biddings on the one lot, which he contended could not be done without opening the biddings on both the lots sold to Wallace. He also urged that the practice of opening biddings was a dangerous one, and should not be extended. He cited *McRoberts v. Durie*, ante p. 211.

*Chadwick* appeared for the infant defendants, and stated he had no objection to the motion. The plaintiff also appeared and did not object.

**SPRAGGE, V.C.**—I think an order proper to open biddings; and in a certain event, and upon certain terms, that *Curtin* may be allowed as purchaser without a re-sale. I give minutes of order to the Registrar, the sale of the other lot can make no difference under the cases.

**MINUTES.**—That upon the proposed purchaser paying to the present the costs, charges, &c., and on his paying within — weeks the sum of £ — by way of deposit into court, it is referred back to the Master to allow of a better purchaser of the said lot, &c., or in case the proposed purchaser shall within the said period of — weeks, pay into court the sum of £85 (*the whole price now offered*), and shall pay to the present purchaser his costs of this application, then the present purchaser shall elect whether or not he will become purchaser at the price offered by the proposed purchaser, and in case he shall elect to become purchaser at such price, he is to notify such his election to the solicitor of the proposed purchaser, within one week after being notified of such purchase money being paid in by the proposed purchaser, and his being paid the costs of this application, and in case the proposed purchaser shall not be so notified, he is to stand as the purchaser of the said parcel at the said sum of £85, and he is thereupon to pay to the present purchaser the costs, charges, &c.

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**KELLY V. SMITH.**

*Motion to commit for non-production—Time for service of notice.*

A notice of motion for an order absolute under Order 31 of 6th February, 1865, must be served at least four clear days before its return, by analogy to the former practice by order *nisi*.

This was an application under Order 31 of the 6th of

February, 1865, to commit for non-production in the Registrar's office. Only two clear days' notice had been given, and *S. H. Blake*, contra, objected that four clear days should have been given by analogy to the old practice by order *nisi*.

**VANKOUGHNET, C.**—So held, and dismissed the application with costs *a*).

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#### DUNN v. DOWLING.

*Partition suit—Confirmation of report—Consol. Stat. U. C. ch. 86.*

The report in a partition suit by bill under Consol. Stat., U. C., ch. 86, does not require to be specially confirmed by the court, but before it will be acted upon it will be examined by the court to see whether there is in it the manifest error referred to in section 24 of the act.

This was a partition suit by bill under Consol. Stat., U. C., ch. 86, and an application was now made by the plaintiff for a vesting order of the portion of the estate allotted to him by the report; the report had been filed, and more than fourteen days had since elapsed.

**SPRAGGE, V. C.**, at first doubted whether the report in such cases did not require a special order of the court to confirm it, but upon looking into the act, held that it was unnecessary, but that the court must examine the report to see whether there is in it the manifest error referred to in section 24 of the act.

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(a) Similar decisions were given subsequently in the cases of *Gamble v. Ellis* and *Connor v. Spragge*.

## DICKSON v. DICKSON.

*Motion to commit for non-production in the Registrar's office—Service of notice.*

A notice of motion for an order absolute for non-production in the *Registrar's office*, under Order 31 of the 6th of February, 1865, requires personal service by analogy to the former practice by order *nisi*.

*S. H. Blake* moved for an order absolute to commit in default of production in the *Registrar's office*. Notice had been served on the solicitor of the party, and not personally.

*Murray*, contra, objected that the service was not sufficient, but should have been personal under section 9 of Order 46, of June, 1853.

*VANKOUGHNET, C.*—The notice “in lieu” of the order *nisi* must be served in the same way as the order *nisi* was formerly required to be served, and when that was personal, the service of the notice in lieu thereof must be personal.

Order refused.

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## HEWARD v. MAGAHAY.

*Husband and wife—Service of Notice—How effected.*

Where a husband and his wife are defendants, service of a notice of motion upon the wife will not be a good service on the husband, unless made at the dwelling house of the husband.

This was an application on notice for an order *pro confesso* against a defendant whose wife was a co-defendant. It appeared that the notice of motion had been served on the wife, but not at the dwelling-house of the husband.

*SPRAGGE, V. C.*—The service is not sufficient, the rule requires that service of papers be personal or at the dwelling house of a party.

Order refused.

## PROUDFOOT v. THOMPSON.

*Dismissal for want of prosecution.*

The plaintiff had served an order to produce upon the defendant, who had thereupon filed an affidavit on production, a copy of which had been demanded by the plaintiff, but had not been served. Under these circumstances, a motion by the defendant to dismiss for want of prosecution was refused with costs.

This was an application to dismiss the plaintiff's bill for want of prosecution.

*S. H. Blake*, contra, for the plaintiff, shewed that the defendant had filed an affidavit on production in pursuance of an order to produce served on him by the plaintiff, that the plaintiff had demanded a copy of the affidavit, but that the demand had not been complied with, and he contended that the motion was therefore irregular; and,

*VANKOUGHNET*, C., under the circumstances, refused the application with costs.

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## BRICKER v. ANSELL.

*Solicitor and Client.*

Although a solicitor may, for sufficient cause, give notice to his client, that he will no longer act as such solicitor, and thus terminate the connection between them, the court will not make an order for that purpose upon the *ex parte* application of the solicitor.

This was an *ex parte* application by *Hodgins*, solicitor of the plaintiff for an order discharging him from further acting in that capacity. The following authorities were cited: *Aychbourn*, Ch. Pr., 8th ed., 684; *Pulling's Law of Attorneys*, 2nd ed. 133, *et seq.*, *Wright v. King*, 9 Beav. 162.

*SPRAGGE, V. C.*—This is an application by a solicitor to be discharged from being solicitor for the plaintiff, and is

made *ex parte*. It is based upon the ground that the firm in which he was, but has ceased to be, a partner, were solicitors to the plaintiffs. I do not find this to be the case. The bill filed is indorsed as filed by the solicitor who makes this application. The name of the firm indorsed appears at the foot of the paper, which indicates only, I apprehend, that the solicitor who filed the bill was a member of that firm; but still he was the plaintiff's solicitor, and upon ceasing to be a partner, continued to be such solicitor.

The application then is by the solicitor for the plaintiff, for an order of the court to discharge him; it is not for an order to *change* the solicitor. No precedent for such an order as is asked for is pointed out. I find in text books on the subject, that a solicitor may, for sufficient reason, give notice that he will no longer act; and I do not mean to say that he may not at his discretion terminate the connection between himself and his client; but I cannot make an order terminating the connection, and that upon an *ex parte* application without some authority being shewn for it.

Order refused.

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#### NOLAN V. NOLAN.

*Motion for interim alimony—Evidence thereon.*

On an application for interim alimony and costs, proof of the marriage is all that is required; it is not necessary to prove any of the other allegations in the bill.

*Prudfoot* moved, on notice, for the usual order for interim alimony, and costs, *de die in diem*. The marriage was duly proved, which it was contended was all that was necessary on an application of this nature. The following authorities were cited in support—*Smyth v. Smyth*, 2 Add. 254; *Cox v. Cox*, 3 Add. 276; *Brown v. Brown*, 2 Haggard, Eccl. Rep. 5; *Miles v. Chilton*, 1 Robertson, 684; *Soules v. Soules*, 3 Grant, 113; *Roger's Eccl. Law*, 38; *Coote, Eccl. Prac.* 338. No proof was tendered in respect of any of the other allegations in the bill.

SPRAGGE, V. C.—According to the English practice the wife seems entitled to an order for interim alimony upon proof of the fact of marriage, without more. In this court the plaintiff has generally produced an affidavit verifying substantially the bill, but I do not know that it has been required. The usual order may go.

Order granted.

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### FURNESS v. METROPOLITAN WATER Co.

Where a company is virtually defunct before bill filed, the proper course to effect service is to apply to the court for an order therefor, otherwise an order *pro confesso* cannot be obtained.

This was an application by *H. Murray* for a direction to the Registrar to draw up the usual foreclosure decree on *præcipe*. It appeared that before bill filed the society was virtually defunct, and that the bill had been served on the President and Secretary without an order therefor having been obtained, and that the time limited for answering had elapsed.

SPRAGGE, V. C.—I have looked into the papers. For all that appears the company may be virtually defunct, and Mr. *Murray* admits that it is so. I think the proper course will be for the plaintiff to take an order for service, say on the President, Vice-President and Secretary.

Ordered accordingly.

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### CUMMINS v. HARRISON.

*Making person interested in equity of redemption a party in the Master's office.*

An order to make a person interested in the equity of redemption of mortgaged property is obtainable by the plaintiff *ex parte*.

This was an *ex parte* application to make a person interested in the equity of redemption of the property in

question, (the suit being for foreclosure,) a party in the Master's office; an affidavit of the plaintiff was read supporting the application, and

SPRAGGE, V. C., granted the application.

NOTE.—See, however, the cases of Penner v. Canniff; Simpson v. Duggan; and Grant v. Patterson, *ante* page 351.

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### BELL v. MILLER.

*Order to commit for non-execution of conveyance.*

Where an order to commit is sought for the non-execution of a conveyance which has been directed to be kept at a solicitor's office for execution, it must be shewn that the conveyance was accessible for execution in such office.

This was an *ex parte* application under the former practice to commit two defendants for the non-execution of a conveyance pursuant to decree and order *nisi*. The order directed that the conveyance should be placed in the office of the plaintiff's solicitor during a specified time, for execution. The papers were regular, except that it was not shewn that the solicitor's office was open and the conveyance accessible during the specified time.

SPRAGGE, V. C.—It should appear that the conveyance was accessible, in the office of the solicitor, for execution, at least during the time the order directs it to be placed there for execution, but a further affidavit may be produced.

[The affidavit was afterwards produced and the order then granted.]

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## WEIR v. TAYLOR.

*Costs of proceedings at law and in equity.*

Where a mortgagee proceeds both at law and in equity, he cannot, in the absence of special circumstances to justify the proceedings, elect to take the Chancery costs instead of those at common law, if the defendant objects thereto.

This was an application on the part of the defendant, made by consent of the solicitors for both parties, in order to have decided the question whether the plaintiff, a mortgagee, was entitled to costs of suing at law, and of proceedings in this court at the same time.

*Rae*, in support of the application, referred to the general orders of 6th February, 1858, and to *Dallas v. Gow*, ante page 65.

*Blake, S. H.*, contra.

*Mowat, V.C.*—The plaintiff is a mortgagee, the defendant being the mortgagor. The plaintiff brought two suits on his mortgage simultaneously; an action of covenant, and a suit to foreclose. The defendant immediately paid the debt and interest, and the common law costs, but objected to pay the costs of this suit; and the present application is made, by mutual arrangement, to test the plaintiff's right to these costs.

Mr. S. H. Blake, for the plaintiff, admitted on the argument, that he could not maintain the right of the plaintiff to the costs of both suits, but contended that by the practice the plaintiff was entitled to elect whether to take the costs of the action at law or of the suit in this court. The language of the General Order (6th February, 1858,) is free from the slightest ambiguity, and is against any such right. Plaintiffs have in several cases been allowed to elect where no objection was made on the part of the defendants, probably under the idea, in the most of these cases, that the costs of one suit were about equal to those in the other, and that the abandonment of the suit at law, and the costs of it, was as advantageous to the defendant as exemption from

the Chancery costs would be ; but I am informed by my brother Spragge that there has never been a decision, after argument, in favor of the right to elect, and no such course of practice as would warrant such a decision now, where the claim is opposed by the defendant, and the very point is presented for adjudication. My judgment is, therefore, for the defendant.

As to the costs of the present application, considering that the real and only question between the parties was as to the plaintiff's right to the costs of both suits, and that on that point the plaintiff was clearly in the wrong, I think that he should pay the costs of this application, but not of affidavits which were unnecessary.

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#### IN RE WILLIAMS.

*Trustee act—29 Vic. c. 28.*

The court cannot, on a petition under the 31st section of the act to amend the law of property and trusts (29 Vic. cap. 28), make a declaration as to the construction of a will.

*Stayner* for petitioner.

MOWAT, V.C.—This is a petition under the 31st section of the late act to amend the law of property and trusts in Upper Canada, 29 Vic. cap. 28. The petitioners are the executors of the will of the late Charlotte Williams ; and the object of it is to obtain the opinion of the court, in the summary manner provided by the act, as to the extent of the discretionary power given to the executors under a bequest in the will of the testatrix of a certain fund “ to be disposed of for charitable purposes, say for the maintenance of the gospel in Tecumseth, in connection with the Church of England, by an assistant minister if needful, and for other charitable purposes ; and I hereby allow my said executors a discretionary power to carry out my wishes in the further disposal thereof.”

The enactment in question corresponds with the 30th

section of the English statute, commonly referred to as Lord St. Leonard's Act (22 and 23 Victoria, chapter 35), and that section is held in the later decisions, not to contemplate questions on the construction of a will. Thus, *In re Lorenz's settlement* (1 Drew. & Sm. 401), the settlement contained a provision for lending certain money to the husband, and the question on which the trustee desired the opinion of the court was whether this provision was compulsory or discretionary. The Vice Chancellor held that the case was not within the act. He observed: "My understanding of that section of the act is, that it was intended by the legislature that the court should have the power to advise a trustee or executor as to the management and administration of the trust property in the manner which will be most for the advantage of the parties beneficially interested, but not to decide any question affecting the rights of those parties *inter se*. \* \* It is true, that, in some cases, the court has (unadvisedly, as I think), upon a petition under this section given its opinion on questions affecting the rights of parties. But I believe that the judges generally now consider that it ought not to be done."

So, *In re Hooper*, (29 Beav. 656), where a petition was presented, under the same section, for the opinion of the court on the construction of a will. "The Master of the Rolls stopped the case, observing that the object of this clause was to assist trustees in the execution of the trusts, as to little matters of discretion; and that this was not a case of that description."

I am bound by these authorities to hold that I cannot express any opinion on the question suggested by this petition. It is unnecessary, therefore, to consider who should be served with the petition.

The testatrix was a *feme covert* at the time of making her will, but the bequest in question was one of money, which appears to have been given to her separate use; and besides the will was made with the consent of her husband, and indeed was written by him, and he as one of the executors has taken probate of it. There seems no doubt therefore as to the validity of the bequest.

## KEMP V. JONES.

*Order to amend after answer—Irregularity.*

A bill was filed against three defendants, A. B. and C., one of whom (C.) was out of the province at the time. An order was obtained for leave to serve C. by substitutional service on A. and B., *for the purpose of a motion for injunction*. A. and B. answered the bill, but C. did not; the bill was then amended, and notice of motion for injunction served on A. and B. for themselves, and together with the bill on them for C. under the order for service. After the motion was disposed of, the plaintiff took out an order dismissing the bill against A. and B., and on the same day an order to amend, under which a re-engrossment of the bill was filed, and served personally on C. This order to amend was styled in the original suit, and worded to amend the "office copies" of the "defendants."

*Held*, that it was a second order to amend after answer, within the meaning of Order 9, of June, 1853, sec. 12, and it was on the application of C. discharged with costs as irregular.

This was a motion by *S. H. Blake* on behalf of the defendant to rescind an order to amend, and to strike out the amendments made thereunder. The facts are as follows: The original bill had been filed against J. A. Jones, Clarkson Jones, and E. Coursol Jones. The defendant E. C. Jones was not served personally, but by substitutional service on the other two defendants as his agents, for the purpose of a motion for injunction, an order having been obtained therefor. J. A. Jones and Clarkson Jones answered the bill, but E. C. Jones did not; the bill was then amended and the motion for injunction disposed of. An order dismissing the bill against the defendants J. A. Jones and Clarkson Jones was taken out on *præcipe*, and on the same day an order to re-amend was taken out, the style of cause therein containing the names of the three defendants, and the body of the order being to amend the "office copies." It was contended that the order to amend last mentioned was a second order to amend after answer within the meaning of section 12, of Order 9, of June, 1853, and was therefore irregular. The following authorities were cited—Taylor's Orders, p. 62, and cases cited; *Davis v. Pront*, 5 Beav. 375; *Attorney-General v. Nethercoat*, 2 M. & Cr. 604; *Smith's Ch. Pr.*, 7th ed. 519-20; *White on Revivor and Supplement*, p. 4;

Horsley v. Fawcett, 10 Beav. 191; Bennett v. Honeywood, 1 W. R. 490.

*Snelling*, contra, contended that the original bill had been served on E. C. Jones by substitution, merely for the purpose of a motion for injunction; that he could not be considered as served for the general purposes of the suit; that he was not a party to the suit at all except for the one particular purpose, and that therefore the amended bill must be taken to be an original, so far as he was concerned; that for the purposes of the motion the order to dismiss must be taken to be prior to the order to amend, especially as the bill was not amended under it till some days afterwards, and that the order was not irregular as against the defendant E. C. Jones, who was the party moving, he never having answered at all. He cited Order 9, June, 1853, sec. 9; *Snelling and Jones' Orders*, 39.

*S. H. Blake*, in reply, contended that the words of the order to amend being "office copies" in the plural, and the style of the cause therein shewed that it was taken out before the order to dismiss, it was therefore irregular against J. A. Jones and Clarkson Jones, and if so, then against all the defendants. He also contended that the service of the original bill was sufficient to constitute E. C. Jones a party to the suit. He referred to *Watson v. Ham*, ante 295.

**SPRAGGE, V. C.**—Mr. *Snelling*'s contention is that upon the filing of the amended bill, which was by re-engrossment, it was a new bill as against E. C. Jones. The order to amend, and the order to dismiss as against the other defendants bear the same date. I cannot agree that it was a new bill; an original and an amended bill are one bill, and a strong example of this is that by the English practice, where after answer to an original bill amendments are made, and there is no answer to the amended bill, the whole bill is taken *pro confesso* notwithstanding the answer to the original bill. It is conceded that when a bill is amended after answer by one defendant, the plaintiff cannot amend, of course, upon the coming in of an answer by another defendant; that is the case here, unless

I can regard E. C. Jones as not a party to the original bill. He was named as a party, and under an order obtained for that purpose, the two other defendants were, as his agents, served with an office copy of the bill for the purpose of an application for an injunction. It is true that he was not personally served, and that the substitutional service authorized by the order was for a particular purpose; but *he* was served by service upon his agents, and though for one purpose only, it cannot be successfully contended that he was still not a party to the bill. The case then is, that he was a party to a bill which other defendants answered; the plaintiff then amended, and he, (E. C. Jones) answered, and the plaintiff took out another order, as of course, to amend, or as his own order correctly expresses it, to re-amend. This according to the practice he was not entitled to do, and I must set aside the order. I must give the defendant his costs, as the plaintiff has chosen to contest the point. I fix them at twenty shillings, if paid promptly before order drawn up.

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### RE ECCLES.

#### *Surrogate Court—Removal from.*

Where a will related to both real and personal estate, and the personal property was worth at least £2000, and it was sworn that the questions to be tried and determined were of such importance and difficulty that they could be more effectually tried and disposed of in this court than in the Surrogate Court, which statement was uncontradicted, the court ordered the removal of the matter into this court.

This was an application to remove the matter of the will of the late Cuthbert Eccles, from a Surrogate Court into this Court on the grounds stated in the head note and judgment.

*Doyle*, for the application.

*Strong*, Q. C., contra.

**MOWAT, V.C.**—The will relates to both real and personal

estate, and the undisputed allegation of the applicant is that the deceased was possessed of a large amount of property real and personal, and that the personal property is worth at least £2000.

The controversy is as to the validity of this will, and the sworn allegation is that "the questions to be tried and determined \* \* are of such importance and difficulty that the deponent believes the same can be more effectually tried and disposed of in this court than in the Surrogate Court." There is no counter affidavit.

I think these statements being uncontradicted are sufficient *prima facie* evidence that the case is of such a nature and of such importance as to make its removal proper. I therefore grant the motion.

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#### McFARLANE v. DICKSON.

##### *Time for Appealing—Re-hearing.*

Where a decree is re-heard, and the order made on the re-hearing is a simple affirmance of the decree, the time for appealing, as of course, dates from the original decree.

The bond given as a security on appeal, and the affidavits of execution and justification were all entitled in the name of the original plaintiffs, one of whom had died, and both were named as obligees in the bond. *Held, irregular.*

In this case a decree for specific performance had been pronounced, which the defendants re-heard, when the court made an order affirming the original decree.

From this order the defendants appealed to the Court of Error and Appeal, and served notice on the plaintiff, who thereupon moved to set aside the bond and proceedings filed and taken with a view to the appeal, on the grounds stated in the head-note and judgment.

*Blain*, for the application.

*Crickmore*, contra.

MOWAT, V. C.—In this case a decree for the plaintiff was pronounced on or about the 4th of March, 1865, and the decree bears date the 21st of March. The cause was afterwards reheard and the decree affirmed. The judgment on the rehearing was pronounced on the 16th of September, 1865. On the 20th of March, 1866, the defendants served a petition of appeal from both decrees, and a notice that the hearing would be brought on upon the 28th of June next. The defendants have filed a bond under the act, (Consol. Stat. U. C., ch. 13, secs. 15 and 16) to secure the plaintiff's costs of appeal, and the debt, interest and costs, which the decree of March, 1865, ordered them to pay.

To this bond and the affidavits accompanying it, the plaintiff takes several objections, and he has gone into evidence as to the sufficiency of the sureties.

The bond and affidavits are entitled with the names of both the original plaintiffs, though one of them had died; and both are named in the bond as obligees. I think this is irregular.

I think also that the defendants are too late to appeal as of course. The statute (sec. 55) requires an appeal to be brought to a hearing within one year from the pronouncing of the decree. The learned counsel for the defendants admitted that it was too late to appeal from the original decree alone, but argued that the appeal, as respects the order on rehearing was in time, and that this carried with it in effect the right to appeal from the original decree. No authority was cited in support of this view, and in the absence of such authority, I incline to think that the court, on the rehearing, having simply affirmed the original decree, the time for appealing as of course from that decree, must be reckoned as if there had been no rehearing. (Vide Beavan v. Mornington, 6 Jur. N. S. 1123.)

Considerable expense appears to have been incurred in taking evidence as to the solvency or insolvency of the sureties, and as I do not decide on this evidence, and as the defendants will, I presume, move for leave to appeal, I shall not at present make any disposition of the costs of the application.

Order—grant the motion—reserve the costs, with liberty to either party to apply in respect thereof as he may be advised.

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### MASON V. JEFFREY.

#### *Security for costs.*

Where a bill was filed by an assignee in insolvency against B. for the indemnification of the estate in respect of a claim by C., which it was alleged that B. should pay, and it appeared that the plaintiff was himself an insolvent person ; that there were no assets whatever of the estate he represented ; and that the suit was brought at his instigation, risk and expense and for his benefit, *Held*, that the plaintiff must give security for costs.

*Cameron, Hector*, for the application.

*Crickmore, J.*, contra.

**MOWAT, V. C.**—This is a motion by Jay Ketchum, one of the defendants, for security for costs.

The plaintiff is the assignee in insolvency of one Smith. The defendant, John D. Armour, has filed a claim against the estate of the insolvent, for a debt against which the plaintiff alleges that the insolvent was entitled to indemnity out of the estate of Elijah Ketchum deceased, and that he, as assignee, has the same equity. The bill accordingly prays that the debt may be paid, and that for this purpose the estate of Elijah Ketchum may be administered, so far as may be necessary.

The defendant supports his application for security by an affidavit alleging that the plaintiff is utterly insolvent, that there are no assets whatever of Smith, and that his estate cannot therefore be prejudiced by the means suggested by the bill ; that Armour is the beneficial plaintiff ; that he has instructed the suit to be brought, and that it is carried on at his expense and risk, and for his benefit. The plaintiff files no affidavit in answer to these statements.

The cases at law, cited in *Lush's Practice*, p. 932, 3rd ed., are in favor of such an application, and Lord St. Leonards

(then Sir Edward Sugden) held, in Burke v. Lidwell, 1 Jones & La. 703, that Courts of Equity had jurisdiction to give defendants the same remedy, and that is the only case in which the point seems to have been before an Equity Court. His lordship observed: "It has been stated that there is no precedent for this application. If there be not, I am prepared to make one. I should consider this court nearly powerless, if it could not stop such a proceeding as that which is now brought under my consideration. The court has jurisdiction over its suitors to compel them to do that which is just. It would be singular if it had not the same power which in this respect is possessed by a court of law. The cases at law are much stronger than the present. In them the plaintiff had a right to sue in his own individual character; but having that right, he was selected to try the question in dispute for the benefit of some rich man. The court would not permit that. Though the party had a right to sue, they would not suffer the rich man to try the question except at the peril of costs. \* \* \* Then comes the question, have I power to act in accordance with my opinion? This person has no property whatsoever, he is not suing for anything belonging to himself, and in fact is a mere tool in the hands of Mr. Waters and his solicitors. It would be a reflection upon the administration of justice if I had not such a power. I am clearly of opinion that I have that power, and I am prepared to exercise it, and to make a precedent if none exist."

I shall therefore grant the order in the present case.

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#### DUGGAN v. MCKAY.

##### *Petition of Revivor.*

It is not necessary to file a petition for leave to present a petition in the nature of a bill of review; one petition under the General Orders answering the double purpose of the bill of review and of the motion for leave to file it under the former practice.

This was a motion by petition for leave to present a

petition in the nature of supplemental bill in the nature of a bill of review.

*Dafoe*, in support of the application.

*Bain, Howard, and Burns*, for the several parties, contra.

**MOWAT, V. C.**—The petition presented, and the petition to be presented are in nearly the same terms, except the prayer, and the evidence offered in support of the one is the same evidence which is to be given in support of the other. I think two petitions are not only unnecessary in fact, but were not contemplated, and are not required by the Order, [IX. sec. 18, of June, 1853]. The petition which that Order substitutes for a bill, must be accompanied “by such proof as would have been requisite upon a motion to file a bill of review,” and this serves the double purpose of the bill and of the motion for leave to file it, both which were necessary under the old practice.

The practice on the point does not appear to have been uniform since the passing of the General Order, and there has been no reported decision upon it, either way. I think, it necessary, therefore, to act on my own view of the proper construction of the Order.

The petition must be amended so as to embody a prayer for the relief desired by the petition of review. The order may then be made at once, as there is no controversy as to the facts, and no room for doubt as to the law.

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#### MALLOCH v. PLUNKETT.

*Notice of reading Master's certificate—Order to commit.*

It is not necessary to state in a notice of motion that a certificate of an officer of the court will be read in support of the application. Such certificate can be read though no such notice be given.

Where an order is complied with after service of notice of motion to commit for disobedience of it, and before the motion comes on; an order to commit will not be granted, but the party will be required to pay to the applicant the costs of the motion within twenty-four hours after their amount has been settled.

This was an application to commit the defendants for not

bringing in accounts into the Master's office pursuant to warrant. A certificate of the Master, shewing that the warrant had not been complied, was about to be read by the applicant, when it was objected that no certificate could be read, as the plaintiff had not intimated his intention of doing so in the notice of motion. It appeared that since the date of the certificate the accounts had been brought in.

SPRAGGE, V. C.—I think it is not necessary to specify in the notice of motion that the party applying will use the certificate of the officer of the court. It is a matter of course, that such certificate must be used, and the party notified must be taken to know this, and therefore need not be informed of it. The accounts being now brought in, the order to commit will not go, but the defendants are to pay the costs of the application, which will be settled by the Registrar, within twenty-four hours after they have been settled. (a)

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#### CITY BANK v. MAULSON.

##### *Practice—Trustee—Costs.*

In a suit against trustees under a voluntary assignment, a decree having been made by consent for taking the accounts, which reserved further directions and costs, an application by the trustees afterwards, and before the Accountant was ready to report, for the payment out of court of money to pay certain expenses they had incurred in the suit, was refused with costs.

*Bain*, in support of the motion.

*Stephens*, contra.

MOWAT, V. C.—This is a suit against the assignees of the defendants Boomer and McPherson, for winding up the affairs of the estate. On the 25th of April, 1865, a decree was made by consent for a receiver, an account, and the administration of the estate; but reserving further directions

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(a) See also *Hodgson v. Bank of Upper Canada*, 8 U. C. L. J. 328.

and costs until after report. The report has not yet been made, and meanwhile the assignees move for payment of \$210, namely, \$100 for costs of getting a statement of their accounts made out for the purposes of this suit, and \$100 due their solicitor for the costs of this suit, and of certain other suits brought by them before the appointment of a receiver and not since proceeded with.

Part of the assets which were in the hands of the assignees when a receiver was appointed, consisted of a sum of several thousand dollars at their credit in the City Bank. The appointment of a receiver disentitled the assignees to call in any of this money—*Evans v. Coventry* (3 Drewry, 82)—and hence the present application.

There is no money in court in this cause, but the case was argued as if this sum was in court. Considering it in that light, I find no practice and no authority which would warrant me in making the order that is asked for. The case of *Re Babcock* (8 Grant, 409), was referred to, but the question there was, not as to paying money out of court, but as to the right of the defendants to deduct from what they had received, a sum of money already paid to their solicitor towards the costs of the suit, and to pay in the balance only, and there must be many cases in which it would not consist with the practice to deny the right to retain sums paid, and in which, nevertheless, the court would not have ordered such payment to be made out of money actually paid into court. More has to be established for this latter purpose than for the former. My brother *Spragge*, in granting the application in *Re Babcock*, observed: “I do not at all mean to affirm the right of an accounting party to retain money in his hands, for the defence of a suit in equity to bring him to account; and in suits against executors, I distinguish between costs of defending the suit, and costs incurred in protecting the estate.” Here the accounting parties are not executors, and the costs of preparing the accounts are not costs incurred in protecting the estate, but in defending the suit. No doubt the other costs due to the solicitor in respect of the present suit, are either wholly or partly of the same character.

As to the costs of the other suits, the affidavits shew nothing of the nature of those suits, why they were brought, and why the appointment of a receiver occasioned their abandonment. If properly incurred the amount will be allowed to the assignees in passing their accounts, but I am aware of no practice or authority in favor of making an order for paying them now.

I do not think the agreement between the City Bank and the assignees, which was relied upon, would justify me in making a personal order against the bank on the present application.

The motion must therefore be refused with costs.

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#### MARTIN v. MITCHELL.

*County Court, removing cause from.*

A suit in the County Court is only removable into this court, under the 57th section of the County Courts' Act (Consol. Stat. U. C., ch. 15), where the County Court *has jurisdiction* in the matter, but the "nature of the claim renders it a proper case to be withdrawn from the jurisdiction of the County Court, and disposed of in the Court of Chancery."

*Osler*, for the plaintiff.

*Burns, W.*, for the infant defendants.

*Benson*, for the administrator.

**MOWAT, V.C.**—This is an application by the plaintiff to remove into this court a suit entered on the equity side of the County Court of the County of Victoria, to foreclose a mortgage on which less than £50 is due. The ground of the application is that there is another mortgage on the property for \$1200, subsequent to the plaintiff's mortgage, and *Hyman v. Roots*, 11 Gr. 202; is referred to as shewing that the County Court has no jurisdiction in such a case. But a suit in the County Court is only removable into this Court, under 57th section of the County Courts' Act (Consol Stat. U. C. ch. 15), where the County Court has jurisdiction in the matter, but where (in the language of the statute), "the

nature of the claim renders it a proper one to be withdrawn from the jurisdiction of the County Court, and disposed of in the Court of Chancery." This enactment does not enable parties to commence suits in a County Court, which the County Court has no jurisdiction to entertain, and the case cited shews the present suit to be of that character. The application must therefore be refused.

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### EMES v. EMES.

*Decree—Delay in carrying into Master's office.*

Where a decree referring a matter to the Master is not, within fourteen days after such decree is pronounced, brought into the Master's office by the party having the carriage thereof, any other party may apply under the General Order, No. 42, sec. 1, without first having the decree drawn up and entered.

This was a motion for an order to give to the defendants the carriage of the decree which had been pronounced, but not carried into the Master's office, although more than the fourteen days allowed by the General Orders for that purpose had elapsed. The plaintiff opposed the application on the ground that the decree had not yet been drawn up and entered; but

MOWAT, V. C.—Where a decree referring a matter to the Master is not, within fourteen days after such decree is pronounced, brought into the Master's office by the party having the carriage thereof, I see no reason why any other party may not apply to the Court under the General Order, No 42, sec. 1, without first having the decree drawn up and entered. The application may not be necessary to entitle him to have the decree drawn up, but I see no reason why the duty and expense should be imposed on him as a matter of course, if he is not to have the carriage of the decree when completed. The General Order assumes that ordinarily a party whose duty it is, may, with reasonable diligence, have the decree completed, entered, and brought into the Master's office within the time named.

## RE HILTS.

An application for the assignment of an administration bond under the act respecting Surrogate Courts, will not be granted without notice to the sureties.

This was an *ex parte* application by *Smart* for an order to assign a probate bond under Consol. Stat. U. C. ch. 16, secs. 65, 82.—*Roaf v. Topping*, Chy. Cham. Rep. 14; and *Stokes v. Crysler*, Ch. Cham. Rep. 14, were cited.

**MOWAT, V.C.**—This is an *ex parte* application by one of the next of kin to Peter Hilts, deceased, for an assignment of a bond taken in the Court of Probate before the 1st of September, 1858, on the grant of an administrator to the estate of the deceased.

I think the application *ex parte* cannot be sustained.

The 82nd sec. of the Consol. Stat. respecting the Surrogate Courts (22 Vic. ch. 16) provides that “the Court of Chancery may order all bonds taken in the Court of Probate on the grant of administration, and in force on the 1st of September, 1858, to be assigned, and the same may be enforced in the name of the assignee, under the authority of the said Court of Chancery, in the same way as provided for in case of assignment of bonds in the Surrogate Court.”

The 65th section enacts that “the judge of every Surrogate Court, on application made on motion or petition in a summary way, and on being satisfied that the condition of any such bond has been broken, may order the registrar of the court to assign the same,” &c.

Neither of these sections states whether the application should be *ex parte* or on notice.

The 17th section enacts that “unless otherwise provided by this act, or by the rules or orders from time to time made under the Surrogate Courts Act, 1858, or under this act, the practice of the said several Surrogate Courts shall, so far as the circumstances of the case will admit, be according to the practice in her Majesty’s Court of Probate in England.”

The act establishing the Court of Probate in England was 20 and 21 Vic. ch. 77, passed 25th of August, 1857; and

by the 29th section of that act it was provided that "the practice of the Court of Probate shall, except where otherwise provided by this act, be, so far as the circumstances of the case will admit, according to the present practice in the Prerogative Court." Now, it is laid down in Coote's Practice of the Ecclesiastical Courts, page 721, that before assigning the administration bond "the court always cites the sureties to shew cause against such a proceeding, in order that they may have a fair opportunity of exonerating themselves from the imputed liability, if such a thing can be done." Even then the assignment is not ordered, and a second notice must be personally served before this step is taken (page 749).

My attention has not been called to any subsequent statutory enactment, or rule or order of court varying or affecting this practice.

The court in this country is to proceed in a summary way (22 Vic. ch. 16, sec. 65); but this direction does not authorise an *ex parte* proceeding, though it enables the courts to dispense with the cumbrous mode of proceeding practised in England, and to dispense with a second notice of the application.

It appears from the same book of practice (page 720) that, generally speaking, the assignment is not ordered until after a judgment at law or decree in equity is obtained against the administrator or his representative, in order to ascertain to what amount the claimant is entitled, and to compel payment of it from the principal before having recourse to the sureties; *vide Younge v. Skelton*, 3 Hagg. 780.

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### BOWEN v. FOX.

*Sale under decree—Vesting order.*

Where the plaintiff, who was the mortgagee in fee of lands sold under the decree, had become the purchaser thereof, an order vesting the lands in the plaintiff as such purchaser, although acquiesced in by the defendants, was refused.

This was an application on behalf of the plaintiff, who

was mortgagee in fee of the premises, for an order vesting in him certain lands and premises purchased by him at a sale thereof under the decree in the cause. The defendants did not object to the motion being granted, but—

MOWAT, V. C., following the ruling in *Ross v. Steele*, *ante* page 94, refused the application, considering that the same reasons which weighed against ordering the mortgagor in such a case to join in a conveyance to the purchaser would operate against making the order asked for, the legal estate being already vested in the purchaser, the plaintiff in the cause.

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#### KELLAR v. TACHE.

*Sale in lieu of partition—Con. Stat. U. C. ch. 86—Past maintenance of infant.*

This court will not allow to a relative of an infant money expended by such relative in past maintenance of the infant, out of the proceeds of land of the infant sold in lieu of a partition under *Consol. Stat. U. C. ch. 86*.

This was an application by Hoskin on behalf of one Benjamin Tache, to be allowed certain moneys expended by him for the past maintenance of a younger brother, an infant. The suit was for partition, but the court had, under *Consol. Stat. U. C. ch. 86*, sec. 25, directed a sale in lieu thereof, which had taken place, and the proceeds had been paid into court. The applicant and the infant were both defendants in the suit and interested in the land sold, and it was out of the infant's share of the proceeds of the sale in court that the amount expended by the applicant was asked to be paid.—*Greenwell v. Greenwell* 5 *Ves.* 194; and *Sisson v. Shaw*, 9 *Ves.* 285, were cited.

VANKOUGHNET, C.—In this case a brother has been supporting his younger brother, between whom and himself a partition was asked, but the court ordered a sale, and the younger brother's share of the proceeds is now in court. This money stands in lieu of the land which he would have

had in partition. If a partition had taken place the land allotted to him could only have been sold under 12 Vic. ch. 72, and it has been again and again ruled here that this will not be done to repay a relative, such as a father, mother or brother for past maintenance. Right or wrong this is now, I think, the established practice here. I think I can deal in no different way with the money which represents the land. It stands in the place of the land by the express provision of the statute permitting sale in lieu of partition. I decline to make any order.

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#### ARDAGH v. WILSON.

Where there are in a foreclosure suit several incumbrancers, and one day is given for them and the mortgagor to redeem, or in default foreclosure, and the incumbrancer first in priority redeems, a new account must be taken and a new day appointed for payment, giving the rest three months longer time to redeem.

This was an application in a foreclosure suit by McCarthy on behalf of McConkey and Ross, incumbrancers, who had proved their claim. It appeared that several incumbrancers had proved claims, and that one day had been appointed for all of them and the mortgagor to redeem. The applicant was first in priority and had paid the amount due on the day appointed, and he now asked for an order to foreclose all the others, contending that he was entitled to such by reason of the default on the day appointed, the same day having been appointed for redemption by all.—*Stead v. Banks*, 5 DeG. & Sm. 560; and *Bates v. Hillcoat*, 16 Beav. 139, were cited.

**VANKOUGHNET, C.**—In this case there are a mortgagor and several subsequent incumbrancers, all of whom are such as judgment creditors. To them one and the same day has been given to redeem. The first in priority of these judgment creditors has redeemed the mortgagee and taken an assignment of his mortgage, and he claims now to foreclose the other incumbrancers absolutely without further day.

This, I think, cannot be done, though I am surprised to find no settled practice in regard to it. I think there must be a new day, and three months given to the subsequent incumbrancers, unless any case be found in which a shorter time has been fixed. The registrar can take the account and name the amount in the order. There need not be any reference to the Master.

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### MARSH v. BEARD.

#### *Security for costs.*

Where a plaintiff, who, when bill filed, was out of the jurisdiction, and had been ordered to give security for costs, afterwards returned within the jurisdiction, but it appeared that he had no business and no intention of entering into any, no fixed place of abode, no house and no family or ties to bind him to the province, and the court was of opinion that the return of the plaintiff was merely to get rid of the order for security, the court declined to rescind it. (a).

This was an application by *Smart* on behalf of the plaintiff, to rescind an order for security for costs made against the plaintiff, he having been out of the jurisdiction when the bill was filed, on the ground that since then he had returned within the jurisdiction. The affidavit of the plaintiff was sworn, in September, 1866, to the following effect :

“ 1. That I returned to this province in May last, and am now and since said date have been resident in the township of Hope, engaged in the business of farming with my brother.

“ 2. That I intend to remain permanently a resident of this province, of which I am a native, and within which I have always resided, except during a short and temporary absence in the State of Michigan.

“ 3. That I will not leave the jurisdiction of this court without the leave of the court or of a judge thereof, or the consent of the defendant, until the expiration of a reasonable time after the entry of the decree in this cause, so as to enable the defendant to take any proceedings which he may be advised for his costs to which he may be entitled in the event of his obtaining a decree against me in this suit.”

On this affidavit the plaintiff was cross-examined, and as the application turned upon it, it is given in full.

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(a.) See next case.

*Cross-examined.*—I am an unmarried man. I lived in Detroit before I returned to this province; I also lived in Saginaw and Dewitt, both in the State of Michigan; I was drawing staves there under a contract; I went there and remained about one year and a half; during that time, however, I had never been in Canada three times. I have no business there now; I have no interest in any business in Michigan. I returned in May last; I have been in Canada ever since, with this exception that I crossed to the other side on the 4th July last. I am at present helping my brother Schuyler as a farmer; I am not farming on my own account. I live with my brother, in the township of Hope; I have no house of my own, and I own no land; I have no personal property, except my wearing apparel. I am staying here now to superintend the progress of this suit, and to recruit my health; I am now suffering from ague, the complaint I contracted in Michigan.

*By Mr. Smart.*—I came here on the 10th May last, partly in consequence of a letter I received from Mr. Smart in regard to this suit, and partly in consequence of a letter I received from my brother, also in relation to this suit. I propose staying until long after this suit is completed; if this suit were ended to-morrow I would not return to Michigan. If a claim the building society have upon certain property my brother left were paid I would own an interest in two farms and some building lots in Canada.

*Re-examined.*—I was informed that I would have to find security to the amount of \$400, or else return to Canada, or I would not be able to prosecute this suit. I returned shortly after receiving this information. The building society lent \$30,000 on property of my father, valued at \$90,000. I have a third interest in the property, subject to the claim of the society.

The following cases were cited by Mr. Smart:—Watson v. Yorston, 1 U. C. L. J. N. S. 97; Place v. Campbell, 6 D. & Lowndes, 113.

*Crombie, contra.*

**VANKOUGHNET, C.**—The impression made on my mind by the affidavit and examination is, that he has returned to this country merely to get rid of the order for security for costs and to carry on the suit. He has no business, no intention of entering into any, so far as I can see; no fixed

place of abode here, no house, no family ; no ties to bind him to the country. His counsel alleges that the allowing the order for security to stand will probably stop the suit. If so, it is because the plaintiff has no means and no credit among his present or former neighbours or friends. It is not complained that the order was improperly granted. The defendant has at present the advantage of it, and I do not think that I am bound to deprive him of this. I will, under the circumstances, however, make the costs costs in the cause.

Application refused.

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HARVEY v. SMITH.

*Security for costs.*

Where a plaintiff, who has been ordered to give security for costs, returns within the jurisdiction to reside permanently, the order will be discharged.

In this case an order for security for costs had been obtained by the defendants, and a motion was made to discharge the same on an affidavit, setting forth in effect that the plaintiff had been born in Upper Canada and had resided there continuously until the summer of 1862, when having entered into a speculation in respect of a quantity of cordwood for the Montreal market, he went to reside there, chiefly for the purpose of attending to the sale of such wood : that the whole of such wood having been disposed of, plaintiff returned to Upper Canada, where he intended residing permanently with his family, and had not any intention of removing from Upper Canada ; and that his residence in Montreal had been temporary only, and for such temporary purpose as before stated.

O'Conner v. Sierra Nevada Company, 24 Beav. 435 ; and Mathews v. Chichester, 30 Beav. 135 ; were referred to.

VANKOUGHNET, C., considering that the affidavit shewed clearly a determination on the part of the plaintiff to continue resident within Upper Canada, made the order as asked.

NOTE.—See the previous case.

## DUFFY v. O'CONNOR.

*Service by publication on an absent infant defendant—Guardian ad litem.*

Where an absent defendant is an infant the court has like powers as to granting an order for service by publication as in case of an adult; but, *Semble*, the notice published should not state that in default of answer the bill will be taken *pro confesso*. The court will also, in exercise of the discretion given to it by 28 Vic. ch. 17, sec. 12, call upon such defendant by the same order, to shew cause why a solicitor of the court should not be appointed his guardian *ad litem*.

This was an *ex parte* application by *Curran* for an order to serve the bill upon the defendant, Charles McKillop, an infant who had been absent from the jurisdiction and not heard of since 1862, nearly four years. Persons in the same interest were co-defendants. The suit was for the sale of devised property to pay a legacy charged upon it. 28 Vic., ch. 17, sec. 12, was referred to.

**MOWAT, V. C.**—Charles McKillop, one of the defendants to the bill in this cause, is under the age of twenty-one years, and, if living, is out of the jurisdiction of the court; and the plaintiff moves for an order enabling him to proceed against McKillop as an absent defendant. Independently of the late statute 28 Vic. ch. 17, sec. 12, the infancy would be no objection to this application—*Chaffers v. Baker* (3 W. R. 201); *Anderson v. Stather* (10 Jur. O. S. 383).—The notice usually endorsed on a bill served is the same, it appears, in the case of an infant as in case of an adult defendant, though it would, I think, be more correct to omit the clause about the bill being taken *pro confesso*, as an order *pro confesso* cannot be made against an infant. (Order 13, sec. 5, June 1853).

To avoid any question as to its being necessary afterwards to publish a notice of motion for the appointment of a guardian to the defendant I think that the order, besides the other usual directions, may call on the defendant to shew cause why, on a day to be named, the court should not assign to the defendant one of the solicitors of the court as guardian, by whom he may answer the bill and defend the suit. The

court may authorise proceedings to be taken against an absent defendant in any "manner that may be provided or ordered, if the court shall under the circumstances of the case deem such mode of proceeding conducive to the ends of justice." This gives the court a wide discretion. In the exercise of this discretion I think publication of an order to the effect I have mentioned would, under the circumstances of the present case, conduce to the ends of justice.

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### BURNHAM v. BURNHAM.

*Dismissal for want of prosecution—Undertaking to speed.*

An undertaking to *speed* is an undertaking to set the cause down on bill and answer, or to file a replication within three weeks. The fact that there is ample time to go to a hearing at the next sittings of the court is no excuse for not filing the replication within the time mentioned.

This was a motion to dismiss the bill for want of prosecution. It appeared that a motion of the kind had been previously made, and that the plaintiff had then undertaken to *speed* the cause, and not (as is usually the case now) to go to a hearing at the next examination term. The plaintiff had not filed replication or done anything in the suit since the undertaking, which had been given more than three weeks prior.

*Ault*, contra, shewed that there was still ample time to go down to the next examination term, where the venue was laid, and contended that the motion was therefore premature.

*Mowat*, V. C.—An undertaking to *speed* is an undertaking to hear the cause or bill or answer, or to file replication, &c., within three weeks from the date of the undertaking (vide 1 Smith's Pr. 321, 2nd ed.) I do not think it is sufficient excuse for not filing replication that there is still time to go to a hearing this autumn, and that if the replication had been filed in three weeks the cause could not have been heard earlier; for if the replication had been filed the defendant could have given notice of hearing, and this may sometimes be an important advantage to a defendant.

On the plaintiff filing replication forthwith I shall make no further order on this motion, except that the plaintiff do pay the costs of it. In default of replication being forthwith filed the bill must be dismissed.

---

### SHAW v. ACKER.

*Absent defendant—Service of bill by publication.*

Where a sole defendant in a foreclosure suit had been absent from the jurisdiction for fourteen years, and had not been heard of during that time, a motion for service of the bill upon him by publication was refused, notwithstanding 28 Vic. ch. 17, sec. 12.

This was an application by J. Hoskin, for an order to advertise an absent defendant. It appeared that the suit was for foreclosure, and that the only defendant was the mortgagor, who had left the province for Australia about fourteen years previously, and had not since been heard of. Taylor on Evidence 4th ed. p. 191 was cited as to the presumption of life or death under such circumstances.

**MOWAT, V. C.**—This was a foreclosure suit. The only defendant is the mortgagor, who left this province for Australia fourteen years ago, and has not since been heard of by his wife and family or by his relations who reside here. A motion is now made for leave to advertise him as a substitution for service, under the late act 28 Vic. ch. 17, sec. 12.

The court, in every such case, must exercise its best discretion, having reference to all the circumstances. Not long ago (a) I made such an order as is asked, against one of several defendants, who, if living, was under twenty-one, the suit being for the sale of devised property to pay a legacy charged upon it, and the absent defendant being one of several joint devisees who were parties to the suit. But I think it would not be proper to do so in a foreclosure suit

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(a). See *Duffy v. O'Connor*, *ante* p. 393.

against a single defendant, in regard to whom on the affidavit filed there is not even expressed any belief that the defendant is still living.

Order refused.

NOTE.—A similar application was refused on the 29th of May, 1865, by his Honor V. C. *Spragge*, in *Kelly v. Macklem*, where one of the defendants had been absent from the province and not heard of for upwards of seven years, on the ground that in such case the presumption of law was that the party was dead, and that the proper course would be to revive in the name of the representatives of such defendant.

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#### IN RE SPROULE.

*Solicitor's lien.*

Property was sold under order in the suit, and the conveyance and a mortgage, which was to be given back to the vendor, were prepared at the purchaser's expense. After engrossment of the deeds by the solicitor for the purchaser they were given to the parties for execution, and the conveyance (executed) was returned to the solicitor of the purchaser, the mortgage being retained by the vendor.—*Held*, on a motion by the vendor to compel the delivery of the conveyance by the solicitor to him as mortgagee, that the solicitor by delivering the engrossment to the vendor for execution had lost his lien thereon for the costs of preparation, as against the vendor (the mortgagee), and was consequently bound to deliver it up to him. *Held*, also, that the application was properly made in the matter in which the sale had taken place.

This was a motion by *Hamilton*, on behalf of Mr. Sproule, a vendor and mortgagee under circumstances stated in the head-note and judgment, to compel the delivery to him of a deed in the hands of Mr. *English* on which he claimed a lien as solicitor for the purchaser (mortgagor) for his charges for preparing the same.

*English*, contra, contended that the court had no power to interfere at the instance of a third party as to a lien claimed by a solicitor against his client; and further, that he not being a solicitor in the cause in which the sale took place, the application should have been entitled in the matter of the solicitor.—*Archibald*, 1858 ed. p. 127.

*Hamilton*, in reply, cited *Howland v. Polley*, before V. C. *Esten*, 31st August, 1861; not reported.

MOWAT, V. C.—The property to which the deed relates was sold under an administration order. The client of the solicitor became the purchaser, and by the terms of sale was to give a mortgage for part of the purchase money and to be at the expense of preparing the conveyance and mortgage. His solicitor prepared the conveyance and mortgage, and delivered the engrossment of the former to the vendor's solicitor for execution. The sale was completed, and both instruments were executed by the several parties thereto, but the conveyance was afterwards handed to Mr. *English*. It is not alleged that he made any stipulation about his lien, as was done in *Watson v. Lyon* (7 DeG. M. & G. 288); and I think it clear that in the absence of such a stipulation the lien he had against his client on the engrossment was gone when he delivered it to the vendor's solicitor. Afterwards and after the deed was executed he could not acquire a lien on it more extensive than his client could then have given him on the property to which the deed related. In other words, his lien was subject to the rights of the vendor as mortgagee; and as a mortgagee has a right to the title-deeds as against the mortgagor, it is plain that the ground on which the present application is resisted cannot be maintained: *Smith v. Chichester* (2 Dru. & War. 216.)

It was objected that a summary application against the solicitor by the mortgagee, in the matter in which the sale had taken place, was irregular. But the case of *Howland v. Polley*, before the late Vice-Chancellor *Esten* (31st August, 1861,) is a direct authority against the objection, and is in accordance with *Bell v. Taylor* (8 Simons 216), referred to in the judgment.

It was not contended that anything which has occurred since the transactions referred to affects the rights of the parties.

The application must be granted, with costs.

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## SMITH v. LINES.

*Revivor—Order pro confesso.*

Where a defendant becomes insolvent after the service of the bill upon him, but before the time for answering expires, and the suit is thereupon revived against the assignee in insolvency, it is necessary to serve the assignee with the bill as well as with the order to revive, or an order *pro confesso* cannot be obtained.

This was an application for an order *pro confesso* against the defendant, under the circumstances stated in the head-note and judgment.

MOWAT, V. C.—In this case the defendant became insolvent, after being served with the bill and before the time for answering had expired.

The plaintiff, on the 27th November, 1865, served an order of revivor upon the assignee appointed under the Insolvency Act, and now moves to take the bill *pro confesso* against the latter, in pursuance of the notice endorsed on the bill served on the original defendant. But by the old procedure, as I understand it, where an answer had not been filed by the original defendant, it was necessary to serve the new defendant with a subpoena to answer the original bill.

By the 9th order of 3rd June, 1853, in lieu of a subpoena a copy of the bill, endorsed as mentioned in the order, is now served; and this is declared to have the same effect as the service on him of a subpoena under the old practice. It seems to follow that in a case of revivor the bill cannot be taken *pro confesso* against the new defendant until a copy of it is served on him, endorsed with a notice addressed to himself.

The order must, therefore, be refused.

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